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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1994

DAVIDSON BROS, INC., a New Jersey Corporation,
Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation;
CITY OF NEW BRUNSWICK, a Municipal Corporation;
C-TOWN, a Division of Krasdale Foods, Inc., and
NEW BRUNSWICK HOUSING AUTHORITY,
a Body Corporate and Politic,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court's refusal to enforce a restrictive covenant contained in a deed on the grounds that the covenant interferes with a governmental agency's redevelopment efforts constitutes an impermissible taking of a private property interest, without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Petitioner:

Davidson Bros., Inc., a New Jersey Corporation

Respondents in Interest:

D. Katz & Sons, Inc., a New Jersey Corporation

City of New Brunswick, a Municipal Corporation

C-Town, A Division of Krasdale Foods, Inc.

New Brunswick Housing Authority, a Body Corporate and Politic

RULE 28.1 LISTING

Davidson Bros., Inc., is a corporation of the State of New Jersey. Its parent company is Davidson Holdings, Inc., a New Jersey corporation.

Affiliated companies of Petitioner are Davidson Brothers, Inc.; Davidson Bros. Management Co., Inc.; Davidson Supermarkets Corp.; Davidson's Market, Inc.; Davidson's Supermarkets, Inc.; D.B. Investment Corp., Inc.; Davidson's Liquor, Inc.; Davidson L. Investment Corp., Inc.; Davidson Bros. Spring Valley, Inc.; LBR, Inc.; Davidson Supermarkets, Inc.; WERL, Inc.; Pet Food Giant, Inc.; and Davidson Realty Associates (a Partnership).

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The determination of the New Jersey Courts to treat a restrictive covenant as "void" as against "public policy," and, therefore, subject to unrestricted taking by governmental agencies without compensation, conflicts with decisions of this Court and lower federal courts, and raises important questions of federal law which have not been, but should be, settled by this Court

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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v.

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On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Superior Court of New Jersey, Appellate Division, was rendered June 23, 1994. That decision is reported at 274 N.J. Super. 159, 643 A.2d 642, and is reproduced at pages 2a-14a of the appendix to this petition ("Pet. App.").

The decision of the Superior Court of New Jersey, Law Division, Middlesex County, rendered on February 16, 1993, is unreported, and is reproduced at Pet. App. 15a-31a.

The prior decision of the Supreme Court of New Jersey was rendered on July 26, 1990. That decision is reported at 121 N.J. 196, 579 A.2d 288, and is reproduced at Pet. App. 32a-69a.

The prior decision of the Superior Court of New Jersey, Appellate Division, rendered September 15, 1988, is unreported, and is reproduced at Pet. App. 70a-77a.

The original decision of the Superior Court of New Jersey, Chancery Division, Middlesex County, rendered on June 30, 1987, is unreported, and is reproduced at Pet. App. 78a-100a.

JURISDICTION

The decision of the Superior Court of New Jersey, Appellate Division, was rendered June 23, 1994. Petitioner's Petition for Certification to the Supreme Court of New Jersey was denied by Order filed November 16, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Davidson Bros., Inc., conveyed certain property in the City of New Brunswick, New Jersey, to Respondent D. Katz & Sons, Inc. ("Katz"), subject to a deed restriction that the premises not be utilized for a supermarket for a period of 40 years, in order to protect another supermarket operated by Davidson Bros. approximately two miles away. Although the deed restriction appeared of record, Respondent Housing Authority of the City of New Brunswick ("Housing Authority") nevertheless acquired that property and chose to lease it, rent-free, to Respondent C-Town for the express purpose of operating a supermarket in violation of the restrictive covenant. The New Jersey courts refused to enforce the covenant, or to award Petitioner compensation for its violation, on the theory that the covenant interfered with the public purpose of encouraging urban redevelopment, and, more particularly, providing a supermarket within walking distance of a segment of the local population. Petitioner urges that the judicial declaration that its covenant was unenforceable simply because it would have prevented a governmental agency from furthering a governmental objective constitutes a naked taking of the property interest represented by that covenant without compensation, and, therefore, violates the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. The decisions of the New Jersey courts therefore conflict with recent determinations of this Court emphasizing that governmental agencies may not deprive private citizens of legitimate property interests, for the ostensible benefit of the public at large, without paying for them. Petitioner therefore urges that this Court grant the present petition for certiorari.

This action was commenced by the filing of a Verified Complaint in the Superior Court of New Jersey, Chancery Division, Middlesex County, on June 18, 1986. As was set forth in the original Verified Complaint and supporting Affidavit, and as has never been disputed, Davidson Bros. owned and operated, at the time this action was commenced, a supermarket at 20 Elizabeth Street, New Brunswick, New Jersey. Davidson Bros. and a related corporation, Irisondra, Inc., had also owned the premises which are the subject of this action, on George Street, New Brunswick, on

which it had operated a supermarket for many years, until on or about September 8, 1980, when title was transferred to Katz, by Bargain and Sale Deeds, for a total consideration of $230,000.00. Both the Deed from Davidson Bros. and the Deed from Irisondra were duly recorded in the Middlesex County Clerk's Office on September 10, 1980, and contained the following restriction:

> "THE lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands".

The George Street store had been operated by Davidson Bros. as a conventional supermarket since approximately 1951 or 1952. The Elizabeth Street store was opened in June of 1978 and similarly operated as a conventional supermarket. The George Street store and the Elizabeth Street store drew customers from similar areas, and were in the same trading area, except that the trading area for the Elizabeth Street store extended further south. There were, and are, also three or four other supermarkets within the two to three mile trading area of both stores.

Although Davidson Bros. had originally hoped to continue to operate at the same level at the George Street store after the Elizabeth Street store was opened, the George Street store instead experienced a decline in sales and value. Accordingly, after both stores had been operating for approximately seven to eight months, Davidson Bros. decided to close the George Street store. In light of its experience, Davidson Bros. required that the restrictive covenant in question be part of any sale in order to assure that a supermarket not be reopened on the site so long as plaintiff was continuing to do business at the Elizabeth Street site. Davidson Bros. would not have sold the property without the covenant, and the contracts of sale entered into with Katz expressly provided for the covenant to be included in each case. Forty years was utilized as the period for the duration of the covenant because the Elizabeth Street lease, including options, had a potential duration of forty

years. The George Street store was closed in February of 1979, and the Elizabeth Street store immediately experienced an increase in sales of approximately 25%, or $25,000.00 per week.

On or about March 11 and 12, 1986, several newspaper reports appeared in which Respondent City of New Brunswick announced its intention to acquire title to the subject premises, and then lease same, rent-free, to C-Town for use as a supermarket. Davidson Bros. immediately took steps, through counsel, to notify all parties of the existence of the covenant, and commenced the present action on June 18, 1986. Although all parties to the transaction were on notice of the restrictive covenant, the trial court originally determined, in a decision dated June 30, 1987, that the covenant was unenforceable on the theory that a covenant against competition does not, as a matter of state property law, "touch and concern" the affected property, and is thus unenforceable against a subsequent purchaser with notice, on the basis of the ancient case of Brewer v. Marshall & Cheeseman, 19 N.J. Eq. 537 (E. & A. 1868) (Pet. App. 78a, 86a-89a). Katz was therefore allowed to realize a $220,000.00 profit by selling the property to the Housing Authority for $450,000.00, free and clear of the covenant. On appeal, the Superior Court of New Jersey, Appellate Division, concluded in an unreported per curiam opinion that while the burden of a covenant not to compete could run with the land, the benefit in this case to the Elizabeth Street property was too "speculative, tenuous and, at best, insubstantial" to warrant enforcement, since the covenant burdened only the George Street property and "did not impair the use of the other 2,000 acres in the market circle as a supermarket" (Pet. App. 70a, 74a).

The New Jersey Supreme Court granted certification, and, in a reported opinion rendered July 26, 1990, reversed the decision of the Appellate Division and remanded the case for trial (Pet. App. 32a). In its decision, the New Jersey Supreme Court rejected the rule set forth in Brewer, relied upon by the trial court, that a covenant against competition will not run with the land, as an "anachronism" (Pet. App. 43a). The Court went on to state that "rigid adherence to the 'touch and concern' test as a means of determining the enforceability of a restrictive covenant is not warranted," and that "reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law" (Pet. App.

44a). That Court further stated:

> "Courts today recognize that it is not unreasonable for parties in commercial property transactions to protect themselves from competition by executing noncompetition covenants. Businesspersons, either as lessees or purchasers, may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity. Hence, rather than limiting trade, in some instances, restrictive covenants may increase business activity" (Pet. App. 44a; emphasis added).

The Supreme Court then set forth eight factors to be considered by a court in determining whether a covenant is reasonable and hence enforceable: (1) the intention of the parties when the covenant was executed; (2) whether the covenant had an impact on the consideration exchanged when the covenant was originally executed; (3) whether the covenant clearly and expressly sets forth the restrictions; (4) whether the covenant was in writing, and recorded, and, if so, whether the subsequent grantee had actual notice of the covenant; (5) whether the covenant is reasonable concerning area, time or duration; (6) whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor; (7) whether the covenant interferes with the public interest; and (8) whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable (Pet. App. 45a-46a). The Court stated that the trial court should determine whether the covenant was reasonable at the time it was enacted, and further said:

> "If it was reasonable then, but now adversely affects commercial development and the public welfare of the people of New Brunswick, the trial court may consider whether allowing damages for breach of the covenant is an appropriate remedy. C-Town could then continue to operate but Davidson would get damages for the value of his covenant" (Pet. App. 49a).

In a concurring opinion, Justice Pollock, joined by Justice Clifford, stated that on the undisputed facts, there was no question that the covenant was enforceable, and that there was nothing in the record to demonstrate that it was unreasonable or contrary to public policy (Pet. App. 60a-64a). Justice Pollock went on to suggest that the majority's "reasonableness" test could result in an unconstitutional taking:

> "Notions of 'changed circumstances' and the 'public interest' thinly veil the Authority's attempt to avoid compensating Davidson for the cost of the lost benefit of an otherwise-enforceable covenant...It is wrong to take Davidson's covenant without compensation just as it would be wrong to take its fee interest without paying for it. Shopkeepers in malls throughout the State will be astonished to learn that non-competition covenants that they have so carefully negotiated in their leases are subject to invalidation because they run counter to a court's perception of 'changed circumstances' and the 'public interest'" (Pet. App. 64a-65a; emphasis added).

Justice Pollock further observed that the Authority held "a trump card not available to all other property owners burdened by restrictive covenants—the power to condemn" (Pet. App. 68a). Justice Pollock therefore suggested that a proper result would have been "to enforce the covenant against the authority and then remit it to its power of condemnation" (Pet. App. 68a). Because, however, forcing the Authority to institute eminent-domain proceedings "conceivably would waste judicial resources and impose undue costs on the parties," a more appropriate result would be to "award damages to Davidson for breach of the covenant" (Pet. App. 68a). Justice Pollock concluded:

> "I can appreciate why New Brunswick residents want a supermarket and why the Authority would come to their aid. Supermarkets may be essential for the salvation of inner cities and their residents. The Authority's motives, however noble, should not vitiate Davidson's right to compensation. The

> fair result, it seems to me, is for the Authority to compensate Davidson in damages for the breach of its otherwise valid and enforceable covenant" (Pet. App. 69a).

Following the remand by the New Jersey Supreme Court, the Housing Authority moved for summary judgment on the basis of the sale by Davidson Bros. of the Elizabeth Street supermarket to an unrelated third party, Burro Corp., in December of 1989. Davidson Bros. acknowledged that as a result of this sale, it no longer had any interest in obtaining injunctive relief, but continued to assert a damage remedy based upon lost sales from the violation of the covenant, beginning in November of 1987, when the C-Town had opened, and the difference between the sales price ultimately realized, and the fair market value of the business with the covenant in full force and effect. Accordingly, by Order entered February 7, 1991, all claims for injunctive relief were dismissed, and the matter was transferred to the Superior Court, Law Division, for trial.

That trial took place before the court, without a jury, on January 21 through January 29, 1993. At the outset of the trial, Davidson Bros. submitted a trial brief in which the "takings" issue was specifically raised, citing Justice Pollock's concurring opinion, and arguing that even if the court were to determine that the covenant conflicted with some legitimate public policy, "the proper result would not be to deprive plaintiff of all of the benefits of the covenant without compensation, any more than a governmental entity could deprive a private party of any other type of property, for a public purpose, without such compensation." The takings issue was again raised in counsel's opening statement and summation.[1]

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[1] In his opening statement, counsel for plaintiff argued that as Justice Pollock had said, "there would be no question, if, in fact, a store were taken . . . there would be compensation for a store," and that the "same principle applies with respect to a restrictive covenant which is a right in property." Similarly, counsel stated during his summation that "even assuming arguendo that a supermarket constitutes a public purpose, the government can only violate a property right, whether it be land or a covenant, by paying for it," and cited the case of New Jersey Housing & Mortgage Finance Agency v. Moses, 215 N.J. Super. 318, 521 A. 2d 1307 (App. Div. 1987), certif. den. 107 N.J. 638, 527 A.2d 460 (1987), for the proposition that "in the event that government wants to violate or restrict the right or acquire property that government has to pay for it."

At the trial, William Davidson, the President of Davidson Bros., testified, initially, to the circumstances concerning the sale of the George Street property and the incorporation of the restrictive covenant, but for which, Mr. Davidson stated, Davidson Bros. would not have sold the property. Mr. Davidson further testified that after C-Town opened for business, the Elizabeth Street store experienced a decline in sales and a decline in gross margins, and ultimately a decline in profitability. Davidson Bros. therefore determined to close the Elizabeth Street store on November of 1989, and sold the Elizabeth Street store to Burro Corp. for a total purchase price of $687,500.00 on or about December 28, 1989.

Albert E. Parziale C.P.A., an expert witness who testified on behalf of Davidson Bros., estimated that Davidson Bros. lost profits, as a result of the opening of the C-Town store, during the two year period beginning November 1987, of $350,000.00. Mr. Parziale also estimated that the fair market value of the business at the time of the sale was $696,000.00, and that if the C-Town had not opened, the value would have been $1,263,000.00, based upon greatly increased sales and earnings, resulting in additional damages of $567,000.00.

The Housing Authority's expert, Andrew Vitale, C.P.A., agreed that the opening of the C-Town Store had resulted in lost sales to the Elizabeth store, although he based his projections on a shorter time period, and therefore arrived at lower figures for projected lost sales, and for potential gross profits over the two years.[2] Mr. Vitale, however, made the additional assumption that an increase in sales would have resulted in a corresponding increase in general and administrative expense allocated to the store, reduced by a factor of 50%, as well as a 100% corresponding increase in operating costs, so that the increase in sales and gross profit somehow would have resulted in no additional profit to Davidson Bros. Mr. Vitale made this assumption notwithstanding the uncontradicted testimony of Mr. Davidson that sales could have been increased by 20% without

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[2] Mr. Parziale had estimated lost sales, during this period, of $1,452,000.00, whereas Mr. Vitale estimated lost sales of only $950,000.00. Similarly, Mr. Parziale estimated lost potential gross profit of $350,000.00, as opposed to only $234,500.00 estimated by Mr. Vitale.

any increase in either operating expense or general and administrative expenses. Because, moreover, Mr. Vitale assumed that an increase in the sales would not have resulted in any increase in profit, he further concluded that the fair market value of the premises, as of the date of the sale on December of 1989, had not been negatively affected by the opening of the C-Town.

Other than Mr. Vitale, the witnesses proffered by Respondents essentially testified to the need for a supermarket in this general area, and to the supposed particular suitability of the George Street store for this purpose. Thus, Richard Keefe, who, at the relevant time, was the Executive Director of the Housing Authority, testified to a substantial number of units of low income and moderate income housing in the downtown area. Mr. Keefe also testified that he had had regular interaction with the tenants of these projects, and that the anticipated closing of the George Street store, by Davidson Bros., was a matter of tenant concern which was brought to his attention. Significantly, Mr. Keefe stated that the tenants had voiced these concerns, even though it "normally would not be a function of the City to assure them that convenient and economic shopping would be available within the neighborhood within that vicinity".

Similar testimony was provided by John A. Lynch, who, during the relevant period of time, was the Mayor of the City of New Brunswick. Mr. Lynch testified that the City had attempted to deal with the closing of the George Street store by, among other things, providing a transportation system for people to go to other supermarkets. Mr. Lynch further testified that the City had attempted to find a supermarket operator for the downtown area, and that none of the other properties available were satisfactory because of the capital required to make them operable as a supermarket. While it would have been preferable for the City to acquire an entire block, and create a strip center with a much larger supermarket, this could not be accomplished due to the lack of available funds. There was, in fact, reluctance to make the other available properties operable as supermarkets, due to the expense, since "even the C-Town is marginal at best, and it's subsidized". The City had acted, notwithstanding the restrictive covenant, on the basis of the advice of counsel that the public purpose would override the covenant, and that it was unnecessary for the City to proceed with eminent domain.

Respondents also produced the testimony of a number of residents and activists in the vicinity of the subject premises, who generally testified, not surprisingly, that the closing of the George Street store had resulted in inconvenience to the local residents, and that the various alternatives available to those low-income residents who did not drive of either shopping at nearby higher-price convenience stores or bodegas, or utilizing taxicabs or other types of public transportation to other supermarkets, were not as satisfactory.

Respondents also called, as a witness, Glenn Patterson, Director of Policy and Development for the City of New Brunswick. Mr. Patterson first became employed by the City of New Brunswick in February of 1988, and thus had no first-hand knowledge concerning either the closing of the George Street store originally, or the subsequent purchase of that store by the Housing Authority, and the lease to C-Town. Rather, he testified, in his capacity as a planner, to his review of census data and other documentation, for the purpose of offering an opinion as to the need for a supermarket in the downtown area. Mr. Patterson stated that according to the 1980 census, the total population in the downtown area was 8,750, and that over 50% of the households in the neighborhood had incomes below poverty level. He also testified that 37% of the units in the downtown area did not have access to a motor vehicle, and that a survey conducted in 1989 of public housing residents, indicated that those residents felt that it was important to have supermarkets close by. Mr. Patterson also stated that according to a 1986 Eagleton Poll, 12% of New Brunswick residents shopped downtown for their food, and that a 1988 poll, conducted after C-Town had opened, showed that 22% shopped downtown for food.

Mr. Patterson made an investigation of sites that might have been available for supermarket use in the fall of 1986, based upon a size of at least 8,000 square feet, surface parking providing access to street level, access for delivery of groceries, zoning for supermarket use, and availability for lease or rent in the fall of 1986, as a result of which four sites, in addition to this George Street store, were identified. Although Mr. Patterson testified to various logistical difficulties with respect to three of these properties, he provided no such testimony as to the fourth such building, at 285 George Street, and his report indicated that the only obstacle was that it was

occupied, at the time, by the New Jersey Department of Labor's Job Services Program. There was nothing in the record, however, to indicate whether anyone had ever considered this location for a supermarket, reviewed the lease with the Job Service Program, or explored the possibility of relocating this program in order to meet this supposedly overwhelming public need.

The other expert witness to testify on behalf of Respondents was Dr. James J. O'Connor, a food marketing consultant retained to advise both private and public sector clients on the more effective utilization of foods from production to consumption. Dr. O'Connor testified that he had toured the downtown area, had reviewed Mr. Patterson's report, and had made a single visit to the C-Town store which lasted 20 to 30 minutes. He did not speak with any representatives of C-Town, and spoke with less than five C-Town customers, and no more than one or two tenants of the housing facilities. Dr. O'Connor testified generally to a study which he had prepared of 250 successful inter-city supermarkets throughout the United States, including visits to 18 or 19 cities. On the basis of these studies, Dr. O'Connor had determined that the absence of a supermarket in the inner city results in higher food prices, poor diets, and neighborhood decay. Dr. O'Connor further testified that based upon his observations of the area surrounding the C-Town, C-Town was "like a cathedral", by which he meant the sense of importance to the lives of the elderly, and low-income, that C-Town conveyed. Over objection, Dr. O'Connor was then permitted to testify that in his view the restrictive covenant was contrary to the public interest, because it is in the public interest to make sure that all citizens have an ample opportunity to receive at least a minimum of decent, nourishing food.

On February 15, 1993, the trial court rendered its opinion (Pet. App. 15a). Purporting to apply the eight factors contained in the New Jersey Supreme Court decision, the trial court initially found that the evidence established the clear intention of the parties, when the covenant was initially imposed, to provide protection to Davidson Bros. in the operation of the Elizabeth Street store (Pet. App. 18a). The court next stated that because the evidence did not establish that Davidson Bros. and Katz, during their negotiations, attached a specific dollar value to the restrictive covenant, the court was unable to determine whether there had been any consideration for

the covenant (Pet. App. 18a). The trial court did find, however, that the parties had stipulated that the covenant was clearly and expressly set forth in writing, that it was recorded, and that all of the parties, including Respondents, had notice of it (Pet. App. 19a). The trial court went on to state that since in its view, factors five (whether the covenant was reasonable concerning area, time or duration); six (whether the covenant imposed an unreasonable restraint on trade or secured a monopoly for the covenantor); and seven (whether the covenant interfered with the public interest), were all intertwined, it would first address the eighth factor, and that there was nothing to indicate any change in circumstance since the imposition of the covenant (Pet. App. 19a).

Turning, then, to factors five, six and seven, the trial court stated that these factors required a determination of whether a covenant forty years in duration was necessary to protect plaintiff's interest in the Elizabeth Street store, whether it was, "basically, against competition," and whether enforcement would "injure the public, the public interest" (Pet. App. 20a). Then, without making reference to any evidence whatsoever, and apparently relying solely upon statements made by counsel for the City during summation, the court held that the inability of the parties to foresee the nature of supermarket operations over the next forty years somehow rendered the duration of the covenant unreasonable (Pet. App. 21a-22a). The trial court completely ignored the fact that Davidson Bros. was seeking enforcement of the covenant only through 1989, a period of only nine years, not forty, from the date of the covenant, and made no findings as to whether nine years was a reasonable period of time, or, if not, what a reasonable period of time would be.

Ultimately, the trial court found that there was a substantial public need for the supermarket, and that enforcement of the covenant substantially injures the public interest and public need (Pet. App. 25a-27a). The court stated that it was balancing the public need/public interest factor against the legitimate needs of Davidson Bros. to protect its business interest against competition, and determined that the public need/public interest "substantially outweighs plaintiff's need in this case to have a forty-year restrictive covenant," and therefore, that the "forty-year restrictive covenant was unreasonable in its duration, restrains trade in the affected area and is clearly injurious and adversely impacts upon public

interest and public need" (Pet. App. 30a). The trial court did not address the issue which the New Jersey Supreme Court had raised as to whether, if the public interest called for a supermarket at this particular location, damages, rather than injunctive relief, would be the appropriate remedy, and stated, to the contrary, that its determination that the covenant adversely impacts upon the public interest and public need rendered the damage issue moot (Pet. App. 30a). Nevertheless, the court commented, "only for information purposes," that because the accountants had arrived at differing conclusions as to whether or not Davidson Bros. had suffered any damages, and because it would have been necessary for the court to determine which approach was the correct one, Davidson Bros. had not carried its burden of proving damages (Pet. App. 30a-31a). A judgment was entered on February 26, 1993, dismissing the complaint in its entirety.

Davidson Bros. appealed this decision to the Superior Court of New Jersey, Appellate Division. In its Brief, Davidson Bros. again raised the takings issue, pointing out that the trial court had failed to make a distinction between a covenant which is utterly void as against public policy, and one which simply interferes with an arguably legitimate governmental purpose in encouraging a particular commercial use, as to which damages rather than injunctive relief would be the appropriate remedy.

Notwithstanding the repeated efforts of Davidson Bros. to raise the takings issue, the Appellate Division decision rendered June 23, 1994 (Pet. App. 2a), affirming the decision of the trial court, made no mention of that issue, or, for that matter, of the eight factors which the New Jersey Supreme Court had set forth. Rather, the Appellate Division flatly stated, as the sole basis for its determination, "that the covenant was so contrary to public policy that it should not be recognized as a valid enforceable obligation" (Pet. App. 6a). The Appellate Division recounted the evidence as to the inconvenience which the lack of a supermarket, within walking distance, caused the local residents, and also recounted Dr. O'Connor's generalized testimony concerning the importance of supermarkets to the inner cities, and the alleged difference in price between products purchased at supermarkets and those purchased at convenience stores (Pet. App. 6a-10a).

On the basis of its determination that the presence of a supermar-

ket at this particular location would serve some public benefit, the Appellate Division concluded that the covenant was, apparently, not a property right at all, but rather, simply a "contract" that was "inconsistent with the public interest or detrimental to the common good" (Pet. App. 11a). The Appellate Division went on to cite, as the basis for its determination of the "public good," legislation such as the New Jersey Economic Development Authority Act, N.J.S.A. 34:1B-1 to 21; the New Jersey Urban Enterprise Act, N.J.S.A. 52:27H-60 to 89, and other laws "too numerous to describe in detail" reflecting a public policy in favor of urban rehabilitation (Pet. App. 11a-13a). The Appellate Division noted that requiring the City to pay Davidson Bros. for the loss of its covenant would have impeded its efforts to relocate a supermarket operation to the downtown area, there being "no economically viable substitute locations," and that the restrictive covenant which Davidson Bros. had insisted upon for the purpose of protecting its existing Elizabeth Street store somehow amounted to a "scorched earth" policy so inimical to the public good as to warrant the taking of the covenant without compensation (Pet. App. 13a-14a).

Davidson Bros. sought, in timely fashion, certification from the New Jersey Supreme Court, specifically setting forth, as one of the questions presented," whether the determination of the Appellate Division to 'void' the restrictive covenant at issue here as 'against public policy' constitutes the impermissible taking of plaintiff's private property interests, without compensation, in violation of the New Jersey and United States Constitutions." By Order filed November 16, 1994, however, the New Jersey Supreme Court denied certification (Pet. App. 1a). The present petition for certiorari has been filed within 90 days of the date of the filing of that Order.

REASONS FOR GRANTING THE WRIT

The determination of the New Jersey courts to treat a restrictive covenant as "void" as against "public policy," and, therefore, subject to unrestricted taking by governmental agencies without compensation, conflicts with decisions of this Court and lower federal courts, and raises important questions of federal law which have not been, but should be, settled by this Court.

As this Court has only recently stated, a "strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Dolan v. City of Tigard, ____U.S.____, 114 S.Ct. 2309, 2322 (1994) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). It is difficult to escape the conclusion that the New Jersey courts in this case sought to utilize precisely such a constitutional "short-cut" by treating a restrictive covenant which would have been enforceable under any traditional test as nevertheless "unreasonable," and void as against "public policy," solely because this particular private property right stood in the way of a contrary use of the property which was deemed to promote some pubic benefit. The takings clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, does not tolerate the extinguishing of private property rights, without compensation, through such legal legerdemain. Clearly this is an area which is ripe for this Court's review, and the present petition should, therefore, be granted.

This Court has, of course, long recognized that the Fifth Amendment's prohibition against the taking of private property for public use, without just compensation, applies against the states through the Fourteenth Amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). The provision is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364

U.S. 40, 49 (1960). The takings clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power, such that any government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

The property interests which may not be taken without compensation, moreover, include not only a fee simple interest, but "every sort of interest the citizen may possess" in property. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). Accordingly, this Court has consistently required compensation to be paid where the taking has involved an interest substantially less than fee simple ownership. See, e.g., Dolan v. City of Tigard, supra (requiring landowner to dedicate portion of property for public greenway, and for pedestrian/bicycle pathway easement); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (conditioning grant of permission to rebuild house on provision of public easement across beachfront property); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra (temporary regulatory taking); Hodel v. Irving, 481 U.S. 704 (1987) (restricting ability to pass undivided fractional interest in certain Indian lands by intestacy or devise); Griggs v. County of Allegheny, Pa., 369 U.S. 84 (1962) (taking of air easement over property).

If, then, the restrictive covenant at issue here represents a property right, that right could not be taken, for the benefit of the public, without paying compensation. Interestingly, this issue has apparently never been dealt with expressly by this Court, and lower federal courts have indicated that the issue is not without some controversy. Thus in United States v. Certain Lands in the City of Augusta, 220 F. Supp. 696 (D. Me. 1963), the court was called upon to determine whether the owners of property adjacent to certain land condemned for the construction of a post office were entitled to compensation by virtue of a deed restriction, for their benefit, precluding the use of the condemned property for non-residential uses. The court in that case noted that while the meaning of "property" as used in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. 220 Supp. at 699. That court further noted that under Maine law restrictive

covenants create enforceable rights, variously characterized as negative easements and as servitudes in nature of easements, which run with the land for the benefit of successive grantees of the dominant estate, any one of whom may maintain an action in equity for its enforcement. The court went on to state that the authorities are "divided on the question of whether the extinguishment of an equitable servitude is a taking of private property for which federal and state constitutional provisions require that compensation be paid when the land to which it is attached is taken for public use;" that the "state decisions are in hopeless and irreconcilable conflict, although the majority view favors compensation," and that the "federal rule has not yet been authoritatively settled." Id. at 700.

That court then stated that the only recent federal cases dealing with the question "have treated the rights created by such restrictions as compensable property interests in the context of federal eminent domain proceedings," citing Adaman Mutual Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960) and United States v. 11.06 Acres of Land, 89 F. Supp. 852 (E.D. Mo. 1950). The court then set forth an analysis which is strikingly applicable to the present case:

> "...The holdings of those cases which deny compensation rest upon one or both of two essentially untenable propositions: First, that a restrictive covenant does not create a type of property interest known to the common law and therefore, does not give rise to an interest for the extinguishment of which compensation must be paid; and second, that a restrictive covenant is illegal and void insofar as it applies against a governmental use and thereby burdens the power of eminent domain. On the other hand, '...the better reasoned authorities have held that the extinguishment of an equitable servitude under the power of eminent domain is the taking of property for public use for which compensation must be paid. ...In some of these cases, the courts have indicated the fallacy in the argument that building restrictions are void as to the government because they interfere with the exercise of a govern-

> mental function, by pointing out that they do not prevent the exercise of the governmental function but merely require compensation to be paid for their infringement." 220 F.Supp. at 700-01 (citing 2 American Law of Property §9.40, at 449 (1952); emphasis added).

The Appellate Division in this case, under the guise of applying the "reasonableness standard" enunciated by the New Jersey Supreme Court, essentially adopted the "untenable" view that the restriction here should be void because it interfered with a governmental function. Indeed, the Appellate Division's observation that the government's urban development efforts would be hampered if it was required to pay compensation for such interests appears to rely upon precisely such a theory. The Appellate Division seemed to believe, moreover, that because the New Jersey Supreme Court had deemed covenants enforceable only if "reasonable," and, moreover, had announced as one of its tests whether the covenant contradicted "public policy," a constitutional short-cut was available pursuant to which the covenant could be taken without any compensation whatsoever simply because it interfered with a governmental function. Since, of course, every such covenant by definition would always be contrary to whatever public policy was sought to be advanced in any given case, such covenants could always be taken without compensation.

Regardless of whether the Appellate Division believed that Davidson Bros. (unlike Katz) should have charitably sacrificed its private property rights to the public good, however, the takings clause should have precluded that court from forcing Davidson Bros. alone "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Dolan v. City of Tigard, supra, 114 S. Ct. at 2316. In the instant case, the municipal authorities sought to provide a public benefit in the form of a supermarket at a particular location which they deemed well suited for its use. Certainly, if Davidson Bros. had not sold the property in the first place, but had instead simply leased it to Katz, on a long-term basis, for some non-supermarket use, the Housing Authority would not have been entitled to terminate the lease, and evict Katz, without any compensation to anyone, on the theory that the lease

agreement constituted a "contract" which was "void" as against the "public policy" that would be served by placing a supermarket in that location instead. Indeed, the Housing Authority only obtained the property itself by purchasing it from Katz, and if Katz had declined to sell voluntarily, the property could only have been obtained through condemnation, rather than by asking a court to terminate Katz' ownership interest entirely as against "public policy." The question for this Court, then, is whether the property right represented by the restrictive covenant is somehow different such that it can be taken without compensation whenever it interferes with the "public interest" in utilizing the property for some purpose the government deems appropriate.

Certainly the question cannot be answered merely by treating this case as one in which state courts have "defined" property rights in accordance with state law. Indeed, the Appellate Division's treatment of the covenant as "unreasonable," and therefore, "void" as against public policy, solely because it interfered with the furthering of a governmental purpose deemed desirable, was only accomplished by effectively distorting and disregarding law in New Jersey, and, indeed, throughout the nation, in order to make it appear that no property right arose. Prior to the Appellate Division decision here, New Jersey law had been clear that a restrictive covenant constitutes an interest in property on the part of the benefitted land owner which must be condemned when that interest interferes with the furtherance of some public purpose. See Township of Millburn v. Pitt, 68 N.J. 424, 346 A.2d 601 (1975) (New Jersey Supreme Court approved procedure by which the Township of Millburn instituted condemnation proceedings for the sole purpose of acquiring the interests of neighboring residents claiming the benefit of a restrictive covenant upon Township owned land so as to permit construction of public library); Duke v. Tracy, 105 N.J. Super. 442, 451, 252 A.2d 749, 754 (Ch. Div. 1969) (Township of Berkeley Heights enjoined from utilizing a portion of its property as a public way in violation of a covenant against use of the land for street purposes, at behest of adjoining property owners benefitted by the covenant, but not barred "from obtaining by purchase a release of plaintiff's rights or from acquiring those rights by eminent domain"); Hayes v. Waverly & Passaic R.R.Co., 51 N.J. Eq. 345, 350-51, 27 A. 648, 650 (Ch. 1893) (covenant precluding

the use of burdened property for an elevated railroad enforceable, notwithstanding the argument that the erection and operation of the railroad was authorized by law, and was for the benefit of the public).

The reasoning of the Appellate Division here thus discarded the property law of New Jersey itself, since in each of the above cases the use in question, whether for a library, public way, or railroad, was plainly one which would have been beneficial to the public. Thus any of those courts could simply have held that because a particular covenant interfered with the provision of such a public benefit, the covenant was a "contract" which was "void" as against public policy. Certainly, there is no particular basis for distinguishing the public interest served, on the one hand, by a public library, or roadway, or railroad, from that served by a supermarket. Nevertheless, those courts did not accuse the neighboring property owners of adopting a "scorched earth" policy, merely because they asserted private property rights, such that they should be punished by being deprived of compensation for their interests. Rather, those courts uniformly recognized that the parties in question had private property rights which could not simply be disregarded because their enforcement interfered with some valid public purpose, and that just compensation was required.

The Appellate Division analysis, moreover, represented a radical departure, not only from New Jersey law, but from law throughout the country, since no case anywhere has ever invalidated a restrictive covenant, as contrary to the "public interest", on the grounds advanced in this case. Rather, covenants have been held void, as against the public interest, only: (1) where they required or sanctioned illegal discrimination, Barrows v. Jackson, 346 U.S. 249 (1953); (2) where they prevented a governmental entity from carrying out a traditional, purely public purpose, such as the construction of a public road, Anderson v. Lynch, 188 Ga. 154, 3 S.E. 2d 85 (1939), or (3) where they prevented an inherently beneficial charitable type of use. See, e.g., Westwood Homeowners Association v. Tenhoff, 155 Ariz. 229, 745 P.2d 976 (Ct. App. 1989) (restrictive covenant which would have precluded residential facility for the developmentally disabled unenforceable); Craig v. Bossenbery, 134 Mich. App. 543, 351 N.W. 2d 596 (Ct. App. 1984) (restrictive covenant barring established of small group home for

continuous care of six or few mentally retarded adults unenforceable).[3] At the same time, however, courts have repeatedly held that restrictions barring even such traditionally charitable and beneficial uses as religious schools, synagogues, and churches are enforceable, and not contrary to public policy. Ginsberg v. Yeshiva of Far Rockaway, 45 N.Y. App. 2d 334, 358 N.Y. S. 2d 477 (Sup. Ct. App. Div. 1974), aff'd, 36 N.Y. 2d 706, 366 N.Y. S. 2d 418, 325 N.E. 2d 876 (1975) (restrictive covenant could properly preclude operation of religious school); Christ's Methodist Church v. Macklanburg, 198 Okla. 297, 177 P.2d 1008 (1947) (restrictive covenant could preclude erection and maintenance of church). It would, needless to say, be a strange jurisprudence indeed which would elevate a supermarket above a church or a religious school in terms of determining whether a restrictive covenant against such a use violates public policy, and may therefore be taken without compensation.

This Court's recent decisions in the takings area have recognized the continuing tension which exists between the desire of governmental agencies to accomplish worthwhile goals while minimizing the expenditure of public funds for that purpose, and the rights of private property owners not to be deprived of their interests, for the public good, without compensation. The present case simply represents an attempt by governmental agencies to escape their responsibilities to pay for the taking of property interests which they have previously recognized by purporting to

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[3] It should be noted that other courts, presented with the same issue, have held that even such obviously inherently beneficial uses may nevertheless be precluded by restrictive covenants. See, e.g., Minder v. Martin Luther Home Foundation, 582 N.E. 2d 788 (Ind. 1991) (statute declaring restrictive covenants prohibiting local group homes for the developmentally disabled and mentally retarded void as against public policy violative of contract clause of State Constitution); Chang v. Magbee, 45 Haw. 454, 370 P. 2d 479 (1962) (convalescent home precluded under restrictive covenant against "boarding houses"); Shaver v. Hunter, 626 S.W. 2d 574 (Tex. Ct. App. 1981), cert. den. 459 U.S. 1016 (1982) (restrictive covenant not unreasonable and against public policy as applied to property used to provide sheltered living arrangements for severely handicapped persons). Indeed, as noted, New Jersey courts have upheld covenants precluding such beneficial uses as a library, public road, or railroad, and have required compensation where they have been violated.

define them out of existence. Obviously, if a restrictive covenant can be deemed "void" as against "public policy" because it interferes with whatever purpose the government seeks to accomplish, an easement, lease, or virtually any other interest in real property could be disposed of in the same manner. This Court has, in the past, acted decisively to make clear that such tactics may not form a basis for allowing the government to avoid its responsibility to pay compensation for property interests taken. Plenary consideration of this case is, therefore, essential, and the present petition should be granted.

CONCLUSION

For all of the reasons previously set forth, therefore, the petition for certiorari should be granted.

Respectfully submitted,

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DATED: February 9, 1995

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SUPREME COURT OF NEW JERSEY
C-356 September Term 1994
38,992

DAVIDSON BROS, INC., etc.,
Plaintiff-Petitioner,

v.

ON PETITION FOR CERTIFICATION

D. KATZ & SONS, INC., etc.,
et al.,
Defendants-Respondents

FILED

NOV. 16, 1994
Stephen W. Townsend
Clerk

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3718-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 15th day of November, 1994.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a
true copy of the original on file office.

Stephen W. Townsend

Clerk of the Supreme Court
of New Jersey

643 A.2d 642

DAVIDSON BROS., INC., A NEW JERSEY CORPORATION, PLAINTIFF-APPELLANT, v. D. KATZ & SONS, INC., A NEW JERSEY CORPORATION; CITY OF NEW BRUNSWICK, A MUNICIPAL CORPORATION; C-TOWN, A DIVISION OF KRASDALE FOODS, INC., AND NEW BRUNSWICK HOUSING AUTHORITY, A BODY CORPORATE AND POLITIC, DEFENDANTS-RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued February 24, 1994—Decided June 23, 1994.

SYNOPSIS

On remand from the Supreme Court, 121 N.J. 196, 579 A.2d 288, the Superior Court, Law Division, Middlesex County, entered judgment, following bench trial, finding that restrictive covenant prohibiting use of inner-city property as supermarket was unenforceable. Vendor that sold property subject to covenant appealed. The Superior Court, Appellate Division, D'Annunzio, J.A.D., held that restrictive covenant was contrary to public interest, unreasonable, and unenforceable.

Affirmed.

Covenants ⇐1

Restrictive covenant prohibiting use of inner-city property as supermarket or grocery store was contrary to public interest, unreasonable, and unenforceable, where vendor that sold property subject to covenant had operated supermarket on property but closed it, vendor's withdrawal of its supermarket caused difficulties and hardships to persons living in inner city and made downtown area less hospitable and desirable place, property was

peculiarly suited for supermarket use and there was no economically viable substitute location, and covenant presented formidable obstacle to remediation of harm caused by vendor's withdrawal of supermarket.

Before Judges GAULKIN, D'ANNUNZIO and WALLACE.

Sheppard A. Guryan argued the cause for appellant (*Lasser, Hochman, Marcus, Guryan and Kuskin*, attorneys; *Mr. Guryan*, of counsel; *Bruce H. Snyder*, on the briefs).

Philip Allan Borow argued the cause for respondent D. Katz & Sons, Inc. (*Robert M. Adochio*, attorney; *Mr. Borow*, on the brief).

William J. Hamilton, Jr., City Attorney, argued the cause for respondent City of New Brunswick (*Mr. Hamilton*, on the brief).

George J. Otlowski, Jr. argued the cause for respondent C–Town (*Mr. Otlowski*, on the brief).

Robert J. Lecky argued the cause for respondent New Brunswick Housing Authority (*Stamberger & Lecky*, attorneys; *Mr. Lecky*, on the brief).

The opinion of the court was delivered by

D'ANNUNZIO, J.A.D.

Plaintiff Davidson Bros., Inc. (Davidson) appeals from a trial court judgment entered after a bench trial held on remand from the Supreme Court. *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 *N.J.* 196, 579 *A.*2d 288 (1990). Applying the reasonableness test formulated by the Supreme Court, the trial court determined that a covenant prohibiting the use as a supermarket of a property in downtown New Brunswick, New Jersey, was unenforceable. We now affirm.

Davidson operated a number of supermarkets in New Jersey. In 1952, it opened a supermarket of 10,000 square feet on George Street in downtown New Brunswick. In June 1978, Davidson took over an existing supermarket located at Elizabeth Street, also in

New Brunswick but approximately two miles from the George Street store (hereinafter George Street), near the border with North Brunswick. Davidson paid $315,000 for the assets of the Elizabeth Street store (hereinafter Elizabeth Street), not including inventory, and made a substantial additional investment for improvements. Davidson leased the Elizabeth Street real property.

Davidson closed George Street in February 1979 because its volume had decreased after Davidson acquired Elizabeth Street. It sold George Street in September 1980 to defendant D. Katz & Sons, Inc. (Katz), a rug merchant. The deed to Katz contained the covenant in issue:

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.

The closing of George Street as a supermarket created a hardship for downtown residents, most of whom did not own or have ready access to motor vehicles. In response to their plight, the city government sought to attract another supermarket operator to the downtown area. The city's efforts culminated in the acquisition of George Street from Katz by the defendant New Brunswick Housing Authority, and the leasing of the property, for one dollar a year, to defendant C–Town, on condition that C–Town invest at least $10,000 for improvements and operate George Street as a supermarket.

Davidson commenced this action to enforce the covenant. Davidson appealed from an adverse summary judgment and we affirmed in an unreported opinion, utilizing traditional "touch and concern" analysis applicable to covenants alleged to run with the land. *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, No. A–5489–86 (App.Div. Sept. 15, 1988). *See generally Caullett v. Stanley Stilwell & Sons, Inc.*, 67 *N.J.Super.* 111, 116–18, 170 *A.*2d 52 (App.Div.1961).

Our Supreme Court granted Davidson's petition for certification and reversed and remanded for a trial. In doing so, the Court

determined that "rigid adherence" to the "touch and concern" requirement was no longer warranted. *Davidson Bros. Inc., supra*, 121 *N.J.* at 210, 574 *A.*2d 288. It held that enforceability of a covenant would depend on its reasonableness, and that the principle of "touch and concern" is "but one of the factors." *Ibid.* The Court then described eight factors to be considered in resolving the reasonableness issue:

1. The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not at the time interfere with existing commercial laws, such as antitrust laws, or public policy.

2. Whether the covenant had an impact on the considerations exchanged when the covenant was originally executed. This may provide a measure of the value to the parties of the covenant at the time.

3. Whether the covenant clearly and expressly sets forth the restrictions.

4. Whether the covenant was in writing, recorded, and if so, whether the subsequent grantee had actual notice of the covenant.

5. Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable. *Alexander's v. Arnold Constable*, 105 *N.J.Super.* 14, 27, 250 *A.*2d 792 (Ch.Div.1969); *Cragmere Holding Corp. v. Socony Mobile Oil Co.*, 65 *N.J.Super.* 322, 167 *A.*2d 825 (App.Div.1961).

6. Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor. This may be the case in areas where there is limited space available to conduct certain business activities and a covenant not to compete burdens all or most available locales to prevent them from competing in such an activity. *Doo v. Packwood*, 265 *Cal.App.*2d 752, 71 *Cal.Rptr.* 477 (1968); *Kettle River R. v. Eastern Ry. Co.*, 41 *Minn.* 461, 43 *N.W.* 469 (1889).

7. Whether the covenant interferes with the public interest. *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 *Ill.* 230, 140 *N.E.* 840 (1923).

8. Whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable. *Welitoff v. Kohl*, 105 *N.J.Eq.* 181, 147 *A.* 390 (1929).

[*Davidson Bros., Inc., supra*, 121 *N.J.* at 211–12, 579 *A.*2d 288.]

On remand, Davidson no longer sought injunctive relief and abandoned its contention that the one dollar per year lease to C–Town was an unconstitutional use of public property for a private purpose. Those changes in position were caused by Davidson's sale of its Elizabeth Street store to another supermarket operator in 1989 for $687,500. Davidson limited its claim to damages consisting of lost sales and profits during the two year period it

competed with C–Town, and the reduced value of its Elizabeth Street store due to C–Town's competition.

Davidson's accountant testified that sales at Elizabeth Street for 1988 and 1989 were $1,452,000 less than they would have been had the George Street store not reopened. He calculated the lost profit on those sales to be $350,000. He also opined that due to the lower sales volume, Davidson sold the Elizabeth Street store for $567,000 less than it should have sold for.

Defendants' accountant disagreed. He testified that although Elizabeth Street may have lost sales due to C–Town's operation of George Street, those lost sales would not have been profitable. Defendants' accountant also testified that the Elizabeth Street store did not lose value as a result of C–Town's competition.

After a lengthy trial, the trial court rendered an oral opinion. Applying the eight factors announced by the Supreme Court, the court found that the 40 year term was unreasonably long (factor 5); that the covenant imposed an unreasonable restraint of trade (factor 6); and that it was contrary to the public interest (factor 7). Regarding factor seven, the court ruled that the covenant adversely impacted the public interest because "there is a substantial public need for the supermarket under the circumstances of this case."

The trial court deemed the damages issue to be moot because of its determination that the covenant was unreasonable and unenforceable. However, the court announced that it was unable to determine from the evidence that Davidson had sustained damages due to C–Town's competition.

We now affirm on the ground that the covenant was so contrary to public policy that it should not be recognized as a valid, enforceable obligation.

The proofs established that New Brunswick is a small city which continues to suffer from many of the maladies affecting the larger cities of New Jersey and the nation, especially in its core downtown area. This area, where George Street is located, has been

the focus of a large scale redevelopment and revitalization effort measured in decades. Although this effort's emphasis has been on commercial projects primarily, the downtown area is also the site of many low to moderate income housing projects of the New Brunswick Housing Authority. These were federally funded projects, and many of their residents depended on George Street for their shopping requirements before Davidson closed the store. George Street is within two blocks of four of those housing projects with a total of 726 units.

The testimony of New Brunswick's Director of Policy, Planning and Economic Development, and his report which was introduced into evidence, provided a demographic profile of the city. There are a total of 3,148 households in the downtown area. Twenty-six percent of those households are below the poverty level, compared with seventeen percent in the balance of the city. Of the "family households" downtown, twenty-eight percent are female householders with children, compared with fourteen percent in the balance of the city. Of the female headed households, fifty-four percent are below the poverty level, which is consistent with the balance of the city. Thirty-seven percent of the downtown housing units have no vehicle, almost twice as many as the balance of the city. Seven hundred and forty-three downtown units are occupied by persons sixty-five years and older; twenty-one percent of those seniors are below the poverty level, almost double the proportion in the rest of the city. The downtown area, therefore, contains the city's greatest concentration of disadvantaged persons.

Davidson's closing of George Street further disadvantaged them. No other supermarket was within walking distance. For those who lacked access to motor vehicles, buses, taxis and dependence on others replaced a walk to the supermarket. The problem was especially difficult for female heads of household who used to send their children to the store or have their children accompany them. With the elimination of George Street, getting

to the supermarket was a particularly difficult exercise in logistics and child care.

But inconvenience was not the only cost. Dr. James J. O'Connor testified for defendants as an expert in food marketing and distribution. Dr. O'Connor's experience involved hands-on management of his family's wholesale and retail food businesses, followed by academic and government experience in food distribution issues. Shortly before his testimony in this case, Dr. O'Connor had completed a study for the United States Department of Agriculture regarding supermarkets in United States cities. According to Dr. O'Connor, the absence of a supermarket in a low income city neighborhood makes food more expensive [1] and has a negative impact on diet and, therefore, on the inner city population's health.

Dr. O'Connor also stated that the absence of a supermarket contributes to inner city decay, because a supermarket is a retail anchor that attracts other retail operations. Withdrawal of a supermarket tends to force other merchants to leave the same neighborhood. The resulting vacuum is filled by convenience stores or "ma and pa" groceries. They are more expensive and lack variety. They rarely have produce and, if they do have it, it is of poor quality. Moreover, selection of poultry and fish is very limited and very expensive. Dr. O'Connor opined that there is a general lack of inner city supermarkets in the nation, which poses a significant social policy problem.

Dr. O'Connor's uncontradicted testimony is consistent with the conclusions reached by a congressional committee. House Select Comm. on Hunger, 100th Cong., 1st Sess., *Obtaining Food: Shopping Constraints on the Poor* (Comm. Print 1987) (hereinafter Report). The committee concluded that "low-income consumers are unable to maximize their limited expendable resources for a basic need—food—because of the barriers of the [sic] location and

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[1] According to Dr. O'Connor, "none of us, as well-off as we are, would pay what the poor pay for ... [illegible] of mayonnaise."

transportation. Hence, the grip of hunger and poverty tightens around the low-income consumer." *Id.* at 1.

The committee recognized the exacerbating impact of "supermarket migration" on this problem:

SUPERMARKET MIGRATION

During the late 1970's and early 1980's major supermarkets migrated away from the inner cities and low-income areas, toward the suburbs. Major reasons cited for the migration by the food industry include: high insurance rates, employment and security problems, and outmoded and understocked inner-city stores—conditions which keep profits low. The exodus to the suburbs provided cheaper land, better control over operational hazards and, in general, greater profits. According to the Food Marketing Institute, in 1981, 90 percent of the conventional grocery stores, located in low-income neighborhoods, [that] either closed voluntarily or went out of business, did so to relocate into the suburbs. These were the stores that had traditionally served low-income areas. During the same year, over one-half the new stores that opened were super stores locating in the suburbs and other higher-income areas.

As these trends continue, low-income urban and rural consumers are faced with fewer food markets in the immediate vicinity of their homes and the greater expense in accessing reasonably priced foods. This migration has increased the economic drain on the urban and rural low-income consumer's already limited food budget, reducing, and in some cases, removing the opportunity for low-income households to shop competitively.

In Newark, NJ, for example, there were more than a dozen grocery stores that covered the inner-city in 1967, today the people of Newark must travel to larger stores outside their communities. Many inner-city residents are not pleased with this situation, but feel helpless: "I want to know why it's so hard for me to get my shopping done here on Bergen St., so I don't have to pay someone $5 to drive me to Kearny. What it points out—when you are poor, you are totally powerless to control what happens in your neighborhood * * * A supermarket shouldn't be so hard [to find] in a country with so much wealth." Research data substantiates the fact that many low-income families are captive to the stores in their areas.

[*Id.* at 4 (footnotes omitted).]

The committee also recognized the impact of the inner city consumers' limited shopping choices:

"You have this perverse irony that the poorest have to pay more for a basic necessity of life." Research conducted by organizations such as the Maryland Food Committee, the Department of Labor, and the Commission on Religion in Appalachia (CORA) indicates that evidence that the poor have more restricted access to stores than the nonpoor and are often forced to pay a higher price for food. This is particularly true in areas that are largely black or elderly. Stores having a wider variety of goods and more reasonable prices are more often in higher income areas.

> Many low-income neighborhoods are predominantly served by smaller independent grocery stores or "mom and pop" type stores, thereby extremely limiting the consumer's choices. Given the nature of the stores in these areas, the shopper is confronted with limited consumption choices which are often, but frequently have to suffice because of the constraints of their living environment. "Because operating costs are so high, small independent store owners claim they try to maintain lower prices by purchasing lower-grade produce." Still, the prices can be 10 to 15 percent higher than those offered by larger, efficient supermarkets. This is due to the fact that these stores are generally independently operated, and are usually unable to maintain a stock that competes with the larger chain firms.
>
> Based on existing research it is fair to say that supermarket chain store affiliation has an important relationship to improved consumption choices for the economically disadvantaged.
>
> [*Id.* at 3 (footnotes omitted).]

In its Report, the committee noted that experts and organizations addressing the problems of urban living recommended the provision of incentives to bring supermarkets back into the cities. The committee recommended, among other policy options, that "State and local governments should implement tax breaks and other incentives to ... small- and medium-sized grocery, and supermarket chains to encourage their expansion and/or relocation in low-income communities." *Id.* at 10;[2] *see also Urban Grocery Gap: Hearing Before the House Select Comm. on Hunger*, 102d Cong., 2d Sess. (1992) (hearing devoted to various initiatives undertaken to encourage supermarket development in inner cities).

New Brunswick's initial efforts to respond to the problem were unsuccessful. It attempted to provide and organize transportation, an option that proved to be ineffective. It also sought to find a downtown property easily adaptable to supermarket use and to attract another supermarket operator to run it. Other than the George street store, however, there was none available.

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[2] The Report cites to earlier studies recognizing the problem of food distribution in inner city and poor rural environments and contains a rich bibliography. *See also Shops in Inner Cities: A Sip of Something Good*, The Economist, Oct. 10, 1992, at 30; Bill Turque et al., *Where the Food Isn't*, Newsweek, Feb. 24, 1992, at 36.

Senator John Lynch, the Mayor of New Brunswick during the relevant period, testified that initial approaches to supermarket operators were unsuccessful because too much capital was required to rehabilitate and convert other buildings to supermarket use. According to Senator Lynch the "problem was making the bottom line work because of assembling the property, providing relocation costs, dealing with [environmental] laws, all of those things that add cost to the bottom line." Moreover, many properties that had conversion potential were unavailable or had other problems.

On the other hand, George Street, the former supermarket, was capable of being easily reconverted to supermarket use.

New Jersey courts have refused to enforce contracts that violate public policy. *See Vasquez v. Glassboro Service Ass'n, Inc.*, 83 *N.J.* 86, 104–05, 415 *A.*2d 1156 (1980) (contract requiring migrant farmworker to leave barracks immediately upon discharge violates public policy). "No contract can be sustained if it is inconsistent with the public interest or detrimental to the common good." *Id.* at 98, 415 *A.*2d 1156.

"The sources of public policy include federal and state legislation and judicial decisions." *Ibid.* The rehabilitation of our inner cities is a public policy of this State often expressed in relevant legislation.

The New Jersey Economic Development Authority Act (EDA), *N.J.S.A.* 34:1B–1 to –21, is intended to promote economic development generally throughout the State. As part of the EDA, the Legislature determined that the "provision of buildings, structures and other facilities to increase opportunity for employment in manufacturing, industrial, commercial, recreational, retail and service enterprises in the State is in the public interest." *N.J.S.A.* 34:1B–2b. The Legislature also specifically addressed the developmental problems of inner cities when it found:

> By virtue of their architectural and cultural heritage, their positions as principal centers of communication and transportation and their concentration of productive and energy efficient facilities, many municipalities are capable of ameliorating the conditions of deterioration which impede sound community growth and develop-

ment; and *that building a proper balance of housing, industrial and commercial facilities and increasing the attractiveness of such municipalities to persons of all income levels is essential to restoring such municipalities as desirable places to live, work, shop and enjoy life's amenities.*

[*N.J.S.A.* 34:1B–2f (emphasis added).]

Similarly, in enacting the New Jersey Urban Enterprise Zones Act, *N.J.S.A.* 52:27H–60 to –89, the Legislature determined that "there persist in this State, particularly in its urban centers, areas of economic distress characterized by high unemployment, low investment of new capital, blighted conditions, obsolete or abandoned industrial or commercial structures, and deteriorating tax bases." *N.J.S.A.* 52:27H–61a. The Legislature also noted that revitalization of those areas required "application of the skills and entrepreneurial vigor of private enterprise; and it is the responsibility of government to provide a framework within which *encouragement be given to private capital investment in these areas, disincentives to investment be removed or abated,* and mechanisms be provided for the coordination and cooperation of private and public agencies in restoring the economic viability and prosperity of these areas." *N.J.S.A.* 52:27H–61 (emphasis added).

In support of these objectives, the Legislature offered a rich variety of subsidies and incentives to businesses operating in a designated enterprise zone. The City of New Brunswick currently is eligible for Open Competitive Urban Enterprise Zone Designation.

Other laws, too numerous to describe in detail, reveal how urban rehabilitation is imbedded in public policy and the public interest. *See, e.g.,* Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A–1 to –49 (legislation prescribing powers, duties and functions of local governments in improving areas in need of redevelopment and rehabilitation); Long Term Tax Exemption Law, *N.J.S.A.* 40A:20–1 to –20 (authorizing local governments to grant tax exemptions to private enterprises in return for their participation in redeveloping and rehabilitating the State's urban centers and distressed communities); Urban Homesteading Act, *N.J.S.A.* 40A:12–31 to –38 (authorizing municipalities to create

"urban homesteading programs" designed to allow for the transfer of municipally owned vacant dwellings to willing applicants for a nominal fee "in order to facilitate their reuse and, equally, to encourage and promote the economic revitalization of this State's urban centers"); *N.J.S.A.* 40:55–21.15 (authorizing municipalities to designate areas as "urban growth zones" and to encourage the development of such areas by exempting them from the terms and requirements of the municipality's land use ordinances and regulations); *N.J.S.A.* 17:37A–1 to –27 (creating the New Jersey Insurance Underwriting Association to help attract private capital to central city areas).

Davidson's withdrawal from George Street caused difficulties and hardships of the nature mentioned earlier and made the downtown area a less hospitable and desirable place. Davidson had the right to terminate its George Street operation. In doing so, however, it imposed a restriction on the use of its former property designed to impede the relocation of another supermarket operation to the downtown area. The evidence supports the conclusion that the George Street store was peculiarly suited for supermarket use, and that there were no economically viable substitute locations. Consequently, the covenant, if enforced through injunctive relief or exposure to a judgment for damages, presented a formidable obstacle to remediation of the harm caused by Davidson's withdrawal. *Cf. Cipollone v. Liggett Group, Inc.*, 505 *U.S.* ——, ——, 112 *S.Ct.* 2608, 2620, 120 *L.Ed.*2d 407, 426 (1992) (obligation to pay damages is an effective method of controlling conduct). By harm, we mean the personal hardship caused by the withdrawal of a supermarket as well as the damage to the ongoing efforts of government and private enterprise to revitalize the city. We are persuaded, therefore, that, in the absence of any equivalent reciprocal benefit to the city, Davidson's scorched earth policy is so contrary to the public interest in these circumstances that the covenant is unreasonable and unenforceable. *Cf. Shell Oil Co. v. Marinello*, 63 *N.J.* 402, 408–11, 307 *A.*2d 598 (1973) (where the legislature has declared that the distribution and sale of motor fuels is "affected with a public interest,"

N.J.S.A. 56:6–19(c), and that distribution and sales through franchise arrangements "vitally affects the general economy of the State, the public interest and the public welfare," *N.J.S.A.* 56:10–2, contractual provision giving Shell Oil Company the right to terminate its business relationship with its franchisee on 10 days notice was void as against public policy), *cert. denied*, 415 *U.S.* 920, 94 *S.Ct.* 1421, 39 *L.Ed.*2d 475 (1974); *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 404, 161 *A.*2d 69 (1960) (because a defectively made automobile is an extremely dangerous instrumentality, an automobile manufacturer's attempted disclaimer of an implied warranty of merchantability "is so inimical to the public good as to compel an adjudication of its invalidity"); *In re Terminated Aetna Agents*, 248 *N.J.Super.* 255, 260, 590 *A.*2d 1189 (App.Div.1990) ("When enforcement of a contract inflicts injury upon the public in some way, a court will not hesitate to declare that contract void as against public policy."), *certif. denied*, 126 *N.J.* 319, 598 *A.*2d 880 (1991).

Affirmed.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. L-MC-91-001758

DAVIDSON BROS., INC., Plaintiff, vs. D. KATZ & SONS, INC., et als., Defendants.	TRANSCRIPT OF DECISION

Place: Middlesex County Courthouse
New Brunswick, N.J. 08903
Date: February 16, 1993

BEFORE:
HON. GEORGE J. NICOLA, J.S.C.

TRANSCRIPT ORDERED BY:
BRUCE H. SNYDER, ESQ. (Lasser Hochman, Marcus, Guryan and Kuskin)

APPEARANCES:
SHEPPARD A. GURYAN, ESQ. (Lasser Hochman, Marcus, Guryan and Kuskin),
Attorney for the Plaintiff.

ARTHUR PHILLIPS, ESQ.,
Attorney for the Defendant, D. Katz & Sons.

WILLIAM HAMILTON, ESQ.,
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ROBERT J. LECKY, ESQ.,
Attorney for the Defendant,
New Brunswick Housing Authority.

GEORGE J. OTLOWSKI, ESQ.,
Attorney for the Defendant, C-Town.
(No appearance.)

THE COURT: This Court is now about to rule in a case that involved a four or five-day non-jury trial entitled I believe Davidson versus numerous defendants, some of which are the City of New Brunswick, its housing authority, I believe C-Town and Mr. Katz, one of the successor grantees in interest.

Before I start, and I don't do this in every case and I hope somebody has a chance to read this record and hear the sentiments of a judge who's wôrn this robe now over thirty years, it was a pleasure having all of you here. I wasn't excited about hearing a non-jury trial, I like a jury around us, but now that i heard it, I'm happy that I did. I met a very fine plaintiff's attorney and no matter how this thing incidentally ends, I want you to know I enjoyed having you all here. Some of you who are here, Arthur Phillips, William Hamilton, Robert Lecky who of course are local in a sense,they're around here more often, I think this is the first opportunity I've ever had to have you in my courtroom in all the years I've been judging in this county and I enjoyed having you and I would extend that same sentiment o George Otlowski if he were here. So I want to thank you very much for presenting a fine case and it makes it so much easier for a judge when he's dealing with people who know what they're doing, and that is not always the case I might say.

Now, with that introduction let me get now to the matter at hand. The Supreme Court basically determined that the record that was made below by the trial court who initially determined that the covenant in question was unreasonable and, hence, unenforceable was insufficient to support that finding, and they remanded that matter back to the trial court and that happens to be me to engage in what they call a fact-sensitive analysis of relevant evidence and a measurement of that evidence against eight specifically enumerated factors in the Supreme Court remand decision which they indicate the trial court should consider when determining whether a restrictive covenant is reasonable or not, and unlike the trial court who initially decided the case on the basis substantially of three affidavits which was characterized by the New Jersey Supreme Court as being insufficient to support the Court's finding and also couched in conclusionary terms, this Court unlike that trial court was not dealing simply with three affidavits.

I heard ten witnesses testify if my count is right, I considered

twenty-one joint exhibits, I considered four plaintiff and one defendant's exhibit on both the issues of reasonableness and damages. The Court unlike the trial court who was reversed by the Supreme Court also had the additional benefit of the Supreme Court's guidance.

It's as clear a case as I have ever read coming out of any court. It provides a clear road map for trial courts, and that's what I always thought was the main purpose of a high court when dealing with an issue of either novel impression or they want to get the message out to the trial courts as to what criteria should be considered. This is very clear. It lists specifically eight factors which the Supreme Court considers to be highly relevant on the issue of the reasonableness or unreasonableness of a commercially imposed restrictive covenant.

And if I am incorrect, please make a notation and correct the record before you leave and before I make any official ruling on this case. When I make reference to what occurred during this trial, you're going to see as I continue that I make every effort to make a complete record, so that if anybody is not satisfied with this Court's ruling, anybody who reads it will not see anything ambiguous about it or struggle trying to find out what my intention was. I'll make it clear.

My recollection is that prior to the commencement of this trial, in fact that very day, the parties stipulated that the constitutionality issue as it pertains to the lease transaction between the Authority and C-Town is no longer an issue in the case and, hence, there would be no need to make any specific reference to any evidence pertaining thereto or any ruling with respect thereof.

As I recall also, the parties initially agreed that there are basically two issues that confronted this Court. The first issue being is the restrictive covenant in question reasonable, and if the Court so determines that it is and holds it enforceable, the other issue would be the damage issue. Obviously, if the Court determines that the covenant is not reasonable and, hence, not enforceable, then the damage issue is moot.

As I further recall, prior to the time trial started, the plaintiff also withdrew his claim for punitive damages and all agreed that injunctive relief is no longer a remedy sought in this case.

There were stipulations made with respect to a couple of the

eight factors, I'll be making reference to it when I go through each one.

Now, before ruling on the reasonableness of the covenant, Counselors, I'd like to make some specific reference to selected segments of the trial testimony and the physical evidence as it pertains to the eight factors and then I'll make my ruling.

The Supreme Court found and later in my ruling you will see that I have also found that the evidence establishes the clear intention of the parties when the covenant was initially imposed, and that intention was to provide protection to the plaintiff in the operation of his Elizabeth Street store which the evidence establishes is approximately a mile and a half from the George Street store, so that purpose was clear. Later I will tell you I make that finding as the Supreme Court did.

The second factor bearing on the issue of reasonableness as specifically enumerated by the Supreme Court is whether there was a value or consideration for the covenant in question. I have, Counselors, the same problem that the Supreme Court experienced as I canvassed this record in determining what, if any, value or consideration to attach to the forty-year restrictive covenant in question.

The Supreme Court noted that while the plaintiff is alleging that the value of that covenant was actually considered during stages of negotiation with defendant Katz and further alleges that Katz in effect paid less than market value because of the restricted use imposed on that property, there is nothing at all in the closing documents or in the testimony as I recall hearing it which specifically allocates to that covenant any monetary value or consideration. I did hear evidence, of course, establishing a $150,000 consideration for a three-year business covenant which was imposed in connection with the sale by the plaintiff of its Elizabeth Street store, but not on the transaction which is the subject matter of this proceeding. The Court would have to engage in pure speculation it if makes an effort on the basis of the evidence it heard and the physical evidence it reviewed to place a consideration or monetary value for the covenant in question.

That takes care of the evidence with respect to factor two. Am I going too fast, Counselors?

MR. GURYAN: No, sir.

THE COURT: With respect to factors three and four I combined them because as I recall the parties stipulated, and if I'm wrong, you'll correct me, that at the time the covenant was imposed that it was clearly and expressly set forth in written, recordable instruments and that all of the parties which includes these defendants in this case had notice of it. I believe the Supreme Court also noted that in its opinion and it stipulated, and I mention it only because I want to be able to also support that stipulation by saying that the evidence in this Court's opinion clearly verifies it. That takes care of three and four.

I'm going to skip around now. I'm not going to go to five, six and seven, and the reason is basically a great deal of the evidence that was offered is relevant to all three factors in part since all of them involve to some extent public interest and that's whether you're dealing with the duration of the covenant, whether you're dealing with the restraint of trade issue or whether you're dealing with the public need or public interest issue, and all of the evidence has some commonality to those issues, and I will save that till the end.

I'm going to move onto issue eight, and that is the factor that deals with changed circumstances, and I like the Supreme Court have not been able to determine that there has been any change of circumstances since the imposition of the covenant in question. In fact, if anything, the evidence indicates that the projects or what you call the low/moderate income housing which was part of the New Brunswick redevelopment, revitalization program were constructed before the store or so before the covenant, so I can't find from the evidence any conclusion that there has been a change of circumstance. I haven't seen proper Supreme Court edict hearing all that evidence.

Now, I'm going to make some reference to relevant factors as to factors five, six and seven.

Five is was the covenant reasonable in its duration, and I have a recollection when we were talking stipulations because the Supreme Court did seem to indicate somewhere in its opinion that it wasn't being challenged at least at that stage on its face in terms of duration and geographical area, and I believe and the record would bear me out, I don't know whether it was on the record or off the record, I was attempting to solicit as many stipulations that I

could have appropriately in this case so we could limit the evidence then to the real issues in dispute, and I think it was Mr. Hamilton that quickly reminded the Court that there is no stipulation as to the reasonableness of that restrictive covenant with respect to its duration, and I'll be making reference to that later. So number five is was the covenant reasonable in point of time, duration, term, forty-years under the circumstances in this case.

The sixth factor is does the covenant impose if enforced an unreasonable restraint of trade. And factor seven is what I call the public issue, there are public issue and public need considerations with respect to the restraint of trade and the factor relative to the reasonableness in terms of duration but the pure public interest if you will factor is the seventh one.

And now I'm going to make some reference to testimony that I recall hearing which I think is relevant and hopefully supportive of the ruling I'll be making in a few minutes.

There is case law which offers some guidance to the Court in determining whether a covenant imposed in a commercial transaction is reasonable or not. I must decide under the totality of all relevant circumstances in this case as determined by the evidence as I see it and believe it whether a forty-year covenant is more than necessary to protect the legitimate business interests of the party who enforced it, rather the party who opposed it, I'm sorry, and that would be the plaintiff. Is it more than is necessary to provide fair and reasonable protection of his interest, does a forty-year restriction on the use of the George Street property considering all of the relevant circumstances in this case interfere with the public interest. That's why I told you public interest permeates here through these three factors. And that's what I've got to decide when addressing that factor.

These principles in terms of adequate protection only, nothing more, and I think someone used the word minimal, one case uses the word simple protection, another one used nothing more than is needed, but the message is loud and clear, do you need forty years to protect Mr. Davidson's interest on Elizabeth Street, that's it, basically, against competition, and if enforcing it you injure the public, the public interest, so these are the factors that I have to consider.

Now, these principles are also applied, Counselors, as you

know in instances where you are dealing with the issue of reasonableness of competitive restrictions that are imposed in an employment relationship when employment is terminated, how long can you keep an employee away from that restricted employment, and we have case law that tells us basically, and, again, we're going back to nothing more than is needed and also, again, that caveat always as long as it does not interfere with public interest.

The Supreme Court suggested to the trial courts that when they deal with the reasonableness factors, they may want to apply some of the analogous standards that had been applied by New Jersey Courts when dealing with the issue of reasonableness of the restrictive competitive covenant in an employment contract.

Plaintiff basically contends that forty years is much too much, it's more than needed. Mr. Hamilton made that position clear in his summation. When I say plaintiff, I'm sorry, I meant the defendant is claiming that it's just much too much. The plaintiff is basically contending that forty years in this case is reasonable, and this Court did hear evidence that there is a correspondence between the forty years of the covenant in question and the aggregate total of the original lease term of the Elizabeth Street store and the renewal option terms. It's significant because there is case law that does uphold covenants as being reasonable, one was twenty-five years where the terms were coextensive with a lease term but in that case they were dealing with lease transactions. We do have here a sales transaction and comparing the term with a lease.

The defendant asserts that there have been many changes in supermarket operations and technology in the past forty years, and there simply is no crystal ball that will provide us with information as to what other foreseeable changes, technologies, may occur with respect to supermarket operations in the next forty years, the point I think that was made by Mr. Hamilton in his summation. The defense also pointed to the fact that when the plaintiff sold its supermarket on Elizabeth Street, its business, a business very similar to the George Street supermarket, they were both described as conventional-type supermarkets, and both stores being basically in the same trade area, that in that transaction the parties assumedly felt that three years was sufficient to protect the competitive interests of the parties and not forty years and emphasizes that you're dealing with basically the two same type stores in the same

trade area.

Commenting now with respect to the factor dealing with restraint of trade, the Supreme Court as I indicated earlier said you could have a restraint of trade situation where there is limited space available for the activity which is restricted or prohibited. It sounds like they're talking about a supply kind of a factor, and there was a case that was cited, I'm not sure whether it was in the plaintiff's brief or by the Supreme Court, I don't have the title in front of me, but it was a case where the Court was dealing with a restriction on the manufacturing of limestone and simply because their evidence established a finding by the Court that there was an inexhaustible supply of limestone, that it neither interfered with public need or public interest, so they were dealing if you will, please, with the supply factor, and perhaps that offers a little more meaning to the Court, Supreme Court's reference to the situation where there is limited space available. And in dealing with restraint of trade issue they said the judge might want to consider the testimony that was offered in a deposition of a C-Town executive to the effect that there was no other store in town and that's why they felt that was the most promising site. They said, Supreme Court that is, that that's evidence you might want to consider, Trial Court, when addressing the restraint of trade issue.

There was evidence presented at this trial, credible evidence, on this issue of restraint of trade relevant thereto that there were two or three other supermarket-type stores in a three-mile radius, that was my best recollection of the testimony, other than the George Street and the Elizabeth Street stores. There was testimony that there were other convenience food stores also in the immediate area of the George Street store.

With respect to the issue of availability of space, this Court heard a great deal of testimony relative to the efforts that were expended by the defendant City Authority to locate a possible, a potential supermarket site to satisfy the needs for affordable foods by the local residents. There was testimony as to how many they looked at and what they looked at, selection criteria and why each of the sites considered failed the selection or qualifying criteria. I have that in the evidence. There was also testimony offered by at least a couple of witnesses, one of which is now Senator John Lynch, former mayor of the City of New Brunswick at the time of

these alleged transactions or part of them at least, evidence offered to explain why the City did not pursue its eminent domain power. The record speaks for itself.

Three defense witnesses who live in the immediate area and who testified that they shop in the store and who testified that they have some familiarity with the shopping habits of the people who live in that locale testified on how we're dealing with a neighborhood that consists predominantly of low and moderate income and single parent families, the elderly citizens like I am now, I'm sixty-two, and also the handicapped. They testified in some detail as to what the public need, the need of the people affected, the local families, had for a convention-type supermarket, how the families have been injured, adversely impacted, by the absence of a supermarket in that area, a market which would provide not only a variety unlike the convenience store of necessary food products, but also at affordable cost unlike the convenience store. You pay for that convenience.

These lay witnesses described how inconvenient and how inadequate the public transportation which was attempted by the City to provide to these families to now travel a distance to supermarkets, how costly taxicab fare is, I heard a lot of testimony how much they charge on different dates and per person and how much per bag for food. These witnesses also testified, and I'll make reference later to other testimony about how this creates a greater hardship by not having a supermarket store in the immediate area, walking distance, and that's mainly because so many of the families that live in this low and moderate area, elderly, disabled, simply do not have means of transportation.

Later you'll hear Mr. O'Connor testify about how his studies also support that finding when you're dealing with people in that particular type setting and they either don't have cars or they have cars that they can't fix because they can't afford it. We also had the Paterson report that your city developer who gave us a percentage statistics about how many people shop downtown and how many don't have cars, how many have cars and so forth, so there's a lot of evidence here, a lot more than I think Judge Keefe, was that the Judge, had before him when he was making his decision.

Mr. O'Connor who eminently qualifies as an expert. You have to be somewhat impressed by his testimony, his background. He's

had extensive experience, training and education here in the United States, abroad; he has served on numerous presidential commissions that deal with food products and agriculture; he studied, he lectured, and he was in Europe, he was in other parts of the world, and he's dealt with food products ranging from its very production or growth to its ultimate consumption and has written studies on the subject, unquestionably qualifies as an expert to offer some opinions in this case which I think are vital and relevant to the issues that I had to decide.

He describes in some detail the role, the importance of a supermarket-type store in an area such as the George Street area, and I don't want to keep saying low and moderate income families, we know what we're talking about here, that's the type we're talking about. He talks also about what conditions, deleterious, adverse conditions, injurious to the public, public interest, public need, occurs when there is an absence of a needed supermarket. I can recall him testifying that you can expect based on his studies and experience that there would be an increase in food product prices when there is no supermarket-type store in that immediate area to serve that type of people.

He indicates as another adverse condition neighborhood decay. I think he was trying to describe to the Court that when a supermarket which he likens to a cathedral to the people in that particular area moves out, expect to see other stores who don't even handle food but provide services to also move out. Often you've heard of the word what is the key store in the center, they're looking for that shopping center. This is what he was talking about. He calls it neighborhood decay.

Another adverse condition that he directly attributes to the lack of a needed supermarket is one that impairs health. He says when people don't have regularly accessible affordable food products, they eat different, their diets are different, their eating habits are different, and often results in what he says serious illnesses, and this is all on the subject of public need.

Once in a while I may refer to the script, I know it by heart, I should by now.

He verifies also the testimony of the three lay witnesses and that is the difficulty of this particular group of people, the low income, moderate income, old, disabled, having transportation. He says that

his studies basically verify that also, lack of adequate means, and that's why the walking distance supermarket becomes even especially more important to these people.

The public interest, public need factor number seven, the Court cited a 1936 Illinois case under that factor. You remember it, it was the National Products case, and there the Court used a demand supply theory again. That's the case I was making mention to before, the limestone case. They referred to that Illinois case way back in 1936. It must still be law; otherwise, it wouldn't have been cited by our Supreme Court, where they were dealing with the supply factor, and that's where they upheld and I believe it was around twenty, twenty-five-year covenant because the facts established that there was an inexhaustible supply of limestone and, hence, restricting the use of its manufacture would not in any way impact adversely upon public need and public interest. Again, the advantage of having that case cited to this Court is that it advances a theory that the Court should apply in determining public need. Again, to deal with supply, and the testimony relative to the unavailability of sites and so forth is all important.

The Court must balance unquestionably the legitimate interest of a property owner to dispose of its property conditionally, to regulate for a reasonable time and only for a reasonable time needed its use to protect its legitimate interest against competition, and that right has to be balanced against the right of the public not to have its interest and needs substantially and adversely impacted by the enforcement of that restriction, and that's what this Court is engaged in basically. I'm engaged in a very delicate balance of conflicting interest, and they both have legitimate interest.

With respect to public need and how the local people perceive it also, that was not only expressed in terms of numerous complaints that were being lodged before various agencies as testified to by knowledgeable witnesses, complaints of the local people over the absence, but there was testimony at least from Senator Lynch, the former mayor, that they felt it was so important that it was one of the if not the major issue in the 1980-1981 mayor's political race here in New Brunswick. So that gives you some idea of the dimension of that need.

We have Mr. Paterson, the City planner, who expresses in terms of percentages how many people who live in the City shop down-

town, how many are low/moderate income producing, elderly and old in the area near that store on George Street, also how many people expressed in percentage terms have cars, means of transportation. I bring that up because it's not just a situation of where I'm hearing testimony from three people that live in the area, but I do have the benefit of a study and the expression of some statistics in that regard.

Mr. O'Connor, the defendant's expert, applied principles and conclusions that were embodied I believe in a 1992 report of a ten-case study to the United States Department of Agriculture, and during the course of his testimony he made reference and held that those principles and those findings, conclusions, were applicable to the instant case.

On cross-examination he indicated as I recall that the analysis, the study of these other cases embodied in that report was far more detailed, far more extensive than the study he made here in New Brunswick which consisted primarily of a visit, a short visit, to the store on George Street, a longer tour of the area immediately surrounding the store, and also his reading of various reports and studies made and thereto particularly that of Mr. Paterson. But as I recall it may have been pursuant to an answer to a question I may have asked, but I do recall it being asked and answered, and that is that he said that notwithstanding the fact that the report which contains the principles and findings that he's applying to this case involves a more detailed study than New Brunswick, that the conditions, the findings and conclusions contained in that report are still forcefully applicable to any area that could be profiled urban containing predominantly low income, single parent families, elderly and disabled.

I hope I'm making clear comments on the evidence, I'm trying to.

He was asked questions relative to any experience that he may have had relative to public entities giving rebates, special concessions, to private entrepreneurs to induce them to come in and provide needed services to the population, and he said that's not uncommon, it happens often, but as I recall on cross-examination he stated that he doesn't recall it ever occurring in cases where there was a business-restrictive covenant. That's my recollection of the testimony in that regard.

The plaintiff did not present, and I'm not suggesting that they had to, I'm only just mentioning it, any testimony from anybody who qualified as an expert. I imagine one can say that Mr. Davidson is an expert based on the many years that he and his family had in supermarket operations, but there was no expert that came here and was qualified by the plaintiff relative to the role and need of the supermarket and any effects on conditions that can be directly attributed to the absence of a supermarket in that particular area.

The plaintiff contends in his summation that public inconvenience cannot be equated to public need.

I realize that it's somewhat abbreviated. I originally wrote thirty-three pages of notes, and when I say wrote them, I mean that's from my trial notes. I condensed it to thirty-three pages. I think I've gotten in only about seven or eight that I just read. I hope it's a fairly accurate, not a lopsided portrayal of the evidence offered relevant to the factors enumerated by the Supreme Court.

Before ruling in this case, and I do realize that if I do determine that the covenant is not reasonable and, hence, not enforceable, that I don't have to address the damage issue, I would like to spend only about five or six minutes making reference so that this record is complete relative to the testimony that was offered which is germane to the damage issue because I spent a lot of time with it.

Most of the evidence if not all of it on the issue of damages consists of the testimony and reports of two accountants, one for plaintiff and one for defendant, both CPAs and both having experience in litigation and matters pertaining to supermarket operations. Basically each, as I recall the testimony, each accountant used a different approach, a different formula and reached different results, different conclusions and calculations.

The plaintiff's accountant calculates damages as a direct result of the breach of the covenant to total $917,000 allocated as follows: $350,000 for gross lost profits, $567,000 representing the diminished fair market value of the Elizabeth store when it was sold as a result of the C-Town operation. Of course, the accountant for the defense calculates no damages at all. So you have $917,000 according to the plaintiff, no damages according to the defense.

In his February 24th, 1992 report marked P-1 the plaintiff's accountant initially states that the analysis he made did not constitute an audit, review or compilation of plaintiff's financial state-

ments or underlying books and records and indicates that he is merely providing his observations and conclusions as to the damages as a result of the breach of covenant. Unlike the defendant's account the plaintiff's accountant did not factor into his calculations and projections general and administrative expenses referred to as G and A expenses which the plaintiff's accountant characterized as corporate and not operating expenses. As I recall the testimony also of the plaintiff's accountant, he indicates that he was advised by the plaintiff that lost sales would have a minimal effect on G and A expenses and he stated, the accountant, that he accepted that representation as true.

The accountant for the plaintiff further testified that many of his conclusions and projections are subjective in nature, and the defendant's accountant also said that that same characterization as it pertains to his conclusions is also applicable. Both were engaged in subjective compilations and conclusions using some established statistics.

In his February 7th, I'm sorry, April 7th, 1992 report marked P-2 of the plaintiff's accountant that dealt with the alleged damage of diminution of fair market value, the plaintiff's accountant expressly states in that report that the information contained therein does not represent an audit in accordance with generally accepted accounting principles but rather a compilation to determine the damages. He testified that he was not familiar with the areas within the trade area described of the two stores; he doesn't know how many stores there are if any in that area other than the George Street and Elizabeth Street store; he is not familiar with promotion strategies that may take place at these stores in terms of promoting sales; consequently, he did not factor any of these conditions or factors into his computations, projections and calculations notwithstanding the fact that he testified that these are conditions which would have a definite competitive impact on the Elizabeth Street operation.

The litigation report of the defendant's accountant dated August, 1992 marked DH-1 expressly states that the information contained in that report does not represent an audit, review or compilation in accordance with generally accepted accounting principles and that he did not perform any test on the financial data available to him. This is now the accountant for the defendant

speaking. That accountant notes that the Elizabeth store showed for two of three years prior to the George Street store reopening losing sales. He describes that it wasn't doing well before the reopening, it wasn't healthy.

Unlike the plaintiff's accountant, the defendant's accountant did factor into his calculations general and administrative expenses because he says these expenses which are generally allocated to each store on the basis of sales is increased if there is an increase in sales. He states that as sales increase at the Elizabeth store, its expenses increase and that in this case they would exceed any potential lost gross profits and the basis of his compilation he calculates that there is no loss of gross profits as a result of the George Street store reopening.

With respect to the fair market value claim of damages, the defendant's accountant testified that good will has a value only if the business being sold produces net earnings and that the Elizabeth Street store didn't. He concludes that the price that the plaintiff sold the Elizabeth Street store for was fair and reasonable and notes that there is nothing in the record or the documents that would suggest that the buyer, I think it was Burroughs, of the Elizabeth store would have paid a higher price for that store if the George Street store had not reopened. Except for the accountant's testimony relative to the Elizabeth sales price, I heard no evidence of any official appraisal, no appraiser came in here and no official appraisal to appraise that particular business.

I have now completed my reference to portions of the evidence, testimonial and physical, as it relates to the factors that I am required to consider and now I am ready to make my ruling. This ruling that I am about to make now is on the issue of the covenant's reasonableness based on a totality of all of the relevant circumstances that I determine exist from the credible evidence, based on stipulations made, based on applicable principles of law as well as the Supreme Court decision in the instant case.

One, that the clear intention behind the covenant was expressed and it was to protect the Elizabeth Street operation located approximately one and a half miles from the George Street store from competition.

Two, the Court as earlier stated is unable to determine on the basis of the evidence presented what the value or consideration of

the restrictive covenant in question was and, hence, makes no specific findings with respect thereto.

Three, on stipulation and on the basis of the evidence presented the restrictive covenant was clearly and expressly set forth in written recordable documents and all parties to this action, all successors in title including C-Town, the lessee, had notice of the existence of that restrictive covenant.

Four, I find and determine that there is insufficient evidence to establish any change in circumstances in the neighborhood, the character of the neighborhood from the date that the covenant in question was imposed.

Five, I find and determine that the forty-year restrictive covenant is much more than is needed to provide protection of the plaintiff's legitimate interest under the circumstances in this case.

Six, based on the totality of all relevant circumstances I find and determine that the forty-year restrictive covenant does constitute a restraint of trade. I'm applying all the principles I cited earlier, the one on demand, supply, availability.

Seven, the evidence clearly establishes and I so find that there is a substantial public need for the supermarket under the circumstances of this case, that enforcement of the restrictive covenants substantially injures, adversely impacts upon the public interest and public need providing this group of people and it's a fairly large group of people with affordable housing, and a refrigerator without affordable, adequate foods certainly doesn't satisfy public need, it's contrary thereto.

I have balanced the public need/public interest factor under the circumstances in this case against the legitimate needs of the plaintiff to protect his legitimate business interest against competition and I have no problem finding and determined that the public need/public interest substantially outweighs the plaintiff's need in this case to have a forty-year restrictive covenant.

Based on the foregoing this Court determines that the forty-year restrictive covenant was unreasonable in its duration, restrains trade in the affected area and is clearly injurious and adversely impacts upon public interest and public need.

The damage issue is now moot; however, I would like to indicate at least for the record that on the basis of all of the evidence bearing on the damage issue much of which I covered this Court if

it had determined that the covenant was reasonable and enforceable could not possibly without engaging in high speculation and being arbitrary determine damages is any sustained by the plaintiff. If you believe the formula is more accurate used by one than the other, you hold one way or then you can hold another way depending on which accountant you're going to determine used the accurate approach.

The plaintiff has the burden of proof of sustaining, it has to sustain its burden of proving the damages claim or that he did, in fact, sustain damages, and if I had to decide the damage issue, I would, and I'm putting this on only for information purposes, I would have no problem in determining that I am simply unable on the basis of the evidence presented pertaining to the damage issue, what damages, if any, were sustained by this plaintiff.

I've made you a ruling, I would ask you all to acknowledge receipt from Lori. She'll put the record back on of all of the physical evidence or in the event anybody wishes to appeal, you're going to be using this again, and I don't want people writing me letters a year or two from now, what did I do with the P-1 report, the P-2 report, the DH-1 report, make sure that all twenty-one joint exhibits or plaintiff's exhibits, one defense exhibit and any other exhibits if there be any are returned appropriately to the party that should have the originals. Okay?

MS. DONINGER: Yes.

THE COURT: Thank you again, Counselors.

MR. GURYAN: Okay, thank you.

(End of proceedings.)

I, Patricia A. Meade, assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Middlesex County Civil Court on February 16, 1993, Tape No. 1, Index No. 0001-end, is a true and accurate record of the proceedings to the best of my knowledge and ability.

Date
3/25/93

_____

Patricia A. Meade, AOC #284

579 A.2d 288

DAVIDSON BROS., INC., A NEW JERSEY CORPORATION, PLAINTIFF-APPELLANT, v. D. KATZ & SONS, INC., A NEW JERSEY CORPORATION; CITY OF NEW BRUNSWICK, A MUNICIPAL CORPORATION; C-TOWN, A DIVISION OF KRASDALE FOODS, INC., A NEW YORK CORPORATION, AND NEW BRUNSWICK HOUSING AUTHORITY, A BODY CORPORATE AND POLITIC, DEFENDANTS-RESPONDENTS.

Argued September 25, 1989—Decided July 26, 1990.

SYNOPSIS

Company which sold property subject to a restrictive covenant providing that the property could not be used as a supermarket or grocery store sued purchaser, city (as subsequent purchaser), and company which leased the property from the city under a five-year term lease which was conditioned on the operation of a full-service supermarket in exchange for one dollar a year and ten thousand dollars in improvements to the property. Plaintiff sought a declaration that a noncompetition covenant was binding on all subsequent owners of the property. Plaintiff also requested an injunction to enjoin city from leasing property on any basis that would constitute a gift to a private party. The Superior Court, Chancery Division, entered summary judgment for defendants, and plaintiff appealed. The Superior Court, Appellate Division, affirmed. Plaintiff's petition for certification was granted. The Supreme Court, Garibaldi, J., held that: (1) a noncompetition covenant will run with the land; (2) a reasonableness test is used to determine the enforceability of a noncompetition covenant; and (3) there was insufficient evidence to determine whether the operation of a supermarket constitutes a "public purpose."

Reversed and remanded.

Pollock, J., filed a concurring opinion in which Clifford, J., joined.

1. Covenants ⇐69(1)

Noncompetition covenant will run with land.

2. Covenants ⇐1

"Touch and concern" test is one of factors court should consider in determining reasonableness of noncompetition covenant in deed.

3. Covenants ⇐1

In determining whether noncompetition covenant in deed is reasonable, court considers intention of parties when covenant was executed and whether parties had viable purpose which did not at time interfere with existing commercial laws, whether covenant had impact on considerations exchanged when covenant was originally executed, whether covenant clearly and expressly set forth restrictions, whether covenant was in writing or recorded and whether subsequent grantee had actual notice of covenant, whether covenant is reasonable concerning area, time, or duration, whether covenant imposes unreasonable restraint on trade or secures monopoly for covenantor, whether covenant interferes with public interest, and whether, even if covenant was reasonable at time it was executed, changed circumstances now make covenant unreasonable.

4. Appeal and Error ⇐1177(9)

Remand was required because evidence in record was insufficient for determination as to reasonableness of restrictive covenant in deed, providing that property could not be used as supermarket or grocery store, and thus, as to whether covenant was enforceable against original covenantor's successor, which was subsequent purchaser with actual notice of covenant.

5. Appeal and Error ⇐1177(7)

Remand was required for determination as to whether constitutional provisions which prohibit donations of public funds for private use were violated by city's five-year term lease of property to private entity, which was conditioned on

operation of full-service supermarket in exchange for one dollar per year and ten thousand dollars in improvements to property; evidence was insufficient to establish that operation of supermarket constitutes "public purpose." N.J.S.A. Const. Art. 8, § 3, pars. 2, 3.

6. Municipal Corporations ⇐722

Public entity need not receive fair consideration for lease so long as activity sponsored is for public purpose and private entity represents controlled means by which government accomplishes public purpose. N.J.S.A. Const. Art. 8, § 3, pars. 2, 3.

Sheppard A. Guryan argued the cause for appellant (*Lasser, Hochman, Marcus, Guryan and Kuskin*, attorneys; *Bruce H. Snyder*, on the brief).

Arthur L. Phillips argued the cause for respondent D. Katz & Sons, Inc., a New Jersey Corporation.

Linda K. Anderson, Assistant City Attorney, argued the cause for respondent City of New Brunswick, a Municipal Corporation (*William J. Hamilton, Jr.*, City Attorney, attorney).

Mary M. Cheh argued the cause for respondent C–Town, a Division of Krasdale Foods, Inc., a New York Corporation (*George J. Otlowski, Jr.*, attorney).

Robert J. Lecky argued the cause for respondent New Brunswick Housing Authority, a Body Corporate and Political (*Stamberger & Lecky*, attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

This case presents two issues. The first is whether a restrictive covenant in a deed, providing that the property shall not be used as a supermarket or grocery store, is enforceable against the original covenantor's successor, a subsequent purchaser

with actual notice of the covenant. The second is whether an alleged rent-free lease of lands by a public entity to a private corporation for use as a supermarket constitutes a gift of public property in violation of the New Jersey Constitution of 1947, article eight, section three, paragraphs two and three.

I

The facts are not in dispute. Prior to September 1980 plaintiff, Davidson Bros., Inc., along with Irisondra, Inc., a related corporation, owned certain premises located at 263–271 George Street and 30 Morris Street in New Brunswick (the "George Street" property). Plaintiff operated a supermarket on that property for approximately seven to eight months. The store operated at a loss allegedly because of competing business from plaintiff's other store, located two miles away (the "Elizabeth Street" property). Consequently, plaintiff and Irisondra conveyed, by separate deeds, the George Street property to defendant D. Katz & Sons, Inc., with a restrictive covenant not to operate a supermarket on the premises. Specifically, each deed contained the following covenant:

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.

The deeds were duly recorded in Middlesex County Clerk's office on September 10, 1980. According to plaintiff's complaint, its operation of both stores resulted in losses in both stores. Plaintiff alleges that after the closure of the George Street store, its Elizabeth Street store increased in sales by twenty percent and became profitable. Plaintiff held a leasehold interest in the Elizabeth Street property, which commenced in 1978 for a period of twenty years, plus two renewal terms of five years.

According to defendants New Brunswick Housing Authority (the "Authority") and City of New Brunswick (the "City"), the

closure of the George Street store did not benefit the residents of downtown New Brunswick. Defendants allege that many of the residents who lived two blocks away from the George Street store in multi-family and senior-citizen housing units were forced to take public transportation and taxis to the Elizabeth Street store because there were no other markets in downtown New Brunswick, save for two high-priced convenience stores.

The residents requested the aid of the City and the Authority in attracting a new food retailer to this urban-renewal area. For six years, those efforts were unsuccessful. Finally, in 1986, an executive of C–Town, a division of a supermarket chain, approached representatives of New Brunswick about securing financial help from the City to build a supermarket.

Despite its actual notice of the covenant the Authority, on October 23, 1986, purchased the George Street property from Katz for $450,000, and agreed to lease from Katz at an annual net rent of $19,800.00, the adjacent land at 263–265 George Street for use as a parking lot. The Authority invited proposals for the lease of the property to use as a supermarket. C–Town was the only party to submit a proposal at a public auction. The proposal provided for an aggregate rent of one dollar per year during the five-year lease term with an agreement to make $10,000 in improvements to the exterior of the building and land. The Authority accepted the proposal in 1987. All the defendants in this case had actual notice of the restrictions contained in the deed and of plaintiff's intent to enforce the same. Not only were the deeds recorded but the contract of sale between Katz and the Housing Authority specifically referred to the restrictive covenant and the pending action.

Plaintiff filed this action in the Chancery Division against defendants D. Katz & Sons, Inc., the City of New Brunswick, and C–Town. The first count of the complaint requested a declaratory judgment that the noncompetition covenant was

binding on all subsequent owners of the George Street property. The second count requested an injunction against defendant City of New Brunswick from leasing the George Street property on any basis that would constitute a gift to a private party in violation of the state constitution. Both counts sought compensatory and punitive damages. That complaint was then amended to include defendant the New Brunswick Housing Authority.

Plaintiff moved for summary judgment, to which defendants responded by submitting three affidavits, one from Agnes Scott, President of the New Brunswick Home Tenants Council; one from Richard M. Keefe, Executive Director of the Housing and Urban Development Authority of New Brunswick; and one from Frank R. Nero, Director of the Department of Policy and Economic Development for New Brunswick, all alleging the need for a supermarket in the area of George Street.

The trial court denied plaintiff's motion and held, in an unreported opinion, that the covenant was unenforceable, relying on *Brewer v. Marshall & Cheeseman*, 19 *N.J.Eq.* 537 (E. & A.1868). That case held that the burden of a covenant will not run with the land and therefore bind a successor unless the covenant "affects the physical use of the land itself." This view "effectively stifles any possibility of covenants relating to competition," 5 R. Powell & P. Rohan, *Powell on Real Property* § 675[3], 60–108 (rev. ed. 1989). (5 *Powell*). Although the *Brewer* decision was an old case, (1868), the trial court was satisfied that it was still controlling and found that the covenant was unenforceable because it did not "touch and concern" the land. Additionally, the trial court noted that the enforcement of non-competition covenants is contrary to a longstanding public policy. However, the trial court observed that the determination of whether the covenant was reasonable and consistent with public policy would require a factual hearing and could not be made in a motion for summary judgment.

The trial court also held that the rent-free lease between the Authority and C–Town did not violate the New Jersey Constitution of 1947, article eight, section three, paragraphs two and three. The court found that the lease was valid inasmuch as it furthered a "public purpose" as defined by a two-part test set forth in *Roe v. Kervick*, 42 *N.J.* 191, 207, 199 *A.*2d 834 (1964).

After the court denied plaintiff's motion for summary judgment, defendants moved for summary judgment, which was granted. Plaintiff appealed, and in an unreported opinion, the Appellate Division affirmed the trial court's judgment. For purposes of its decision the Appellate Division assumed that *Brewer* was not applicable, that noncompetitive covenants may run with the land in appropriate cases, that a leasehold interest in land is a sufficient interest to enforce a covenant, that two miles between the burdened and benefitted properties does not itself prevent a covenant from being enforced, and that the George Street store would impair the profitability of the Elizabeth Street store. Although the Appellate Division found "some merit" to plaintiff's argument that *Brewer v. Marshall*, *supra*, 19 *N.J.Eq.* 537, no longer represented the current law in New Jersey, the court held that the covenant was unenforceable against a subsequent grantee because the benefit did not "touch and concern" plaintiff's Elizabeth Street property. Specifically, the court reasoned that because the covenant restricted such a comparatively small portion of the market area, less than one-half an acre, and did not impair the use of the other 2,000 acres in the market circle from which the Elizabeth store draws its clientele, the covenant did not enhance the value of the retained estate, and therefore, as a matter of law, would not bind a subsequent purchaser. In contrast to the trial court's decision, the Appellate Division's rationale was premised on the failure of the benefit of the covenant to run, not of the burden.

The Appellate Division also affirmed the trial court's judgment that the rent-free lease was constitutionally valid, substantially for the reasons expressed by the trial court.

We granted plaintiff's petition for certification. 113 *N.J.* 655, 552 *A.*2d 177 (1988).

II

A. *Genesis and Development of Covenants Regarding the Use of Property*

Covenants regarding property uses have historical roots in the courts of both law and equity. The English common-law courts first dealt with the issue in *Spencer's Case*, 5 *Co.* 16a, 77 *Eng.Rep.* 72 (Q.B.1583). The court established two criteria for the enforcement of covenants against successors. First, the original covenanting parties must intend that the covenant run with the land. Second, the covenant must "touch and concern" the land. *Id.* at 16b, 77 *Eng.Rep.* at 74. The court explained the concept of "touch and concern" in this manner:

> But although the covenant be for him [an original party to the promise] and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch and concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assignees to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger. [*Ibid.*]

The English common-law courts also developed additional requirements of horizontal privity (succession of estate), vertical privity (a landlord-tenant relationship), and that the covenant have "proper form," in order for the covenant to run with the land. C. Clark, *Real Covenants and Other Interests Which Run With the Land* 94, 95 (2d ed. 1947) (*Real Covenants*). Those technical requirements made it difficult, if not impossible, to protect property through the creation of real covenants. Commentary, "Real Covenants in Restraint of Trade—When Do They Run With the Land?," 20 *Ala.L.Rev.* 114, 115 (1967).

To mitigate and to eliminate many of the formalities and privity rules formulated by the common-law courts, the English chancery courts in *Tulk v. Moxhay*, 2 *Phil.* 774, 41 *Eng.Rep.* 1143 (Ch. 1848), created the doctrine of equitable servitudes. In *Tulk*, land was conveyed subject to an agreement that it would be kept open and maintained for park use. A subsequent grantee, with notice of the restriction, acquired the park. The court held that it would be unfair for the original covenantor to rid himself of the burden to maintain the park by simply selling the land. In enjoining the new owner from violating the agreement, the court stated:

> It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.
>
> [*Id.* at 777–78, 41 *Eng.Rep.* 1144].

The court thus enforced the covenant on the basis that the successor had purchased the property with notice of the restriction. Adequate notice obliterated any express requirement of "touch and concern." Reichman, "Toward a Unified Concept of Servitudes," 55 *S.Cal.L.Rev.* 1177, 1225 (1982); French, "Toward a Modern Law of Servitudes: Reweaving Ancient Strands," 55 *S.Cal.L.Rev.* 1261, 1276–77 (1982). *But see* Burger, "A Policy Analysis of Promises Respecting the Use of Land," 55 *Minn.L.Rev.* 167, 217 (1970) (focusing on language in *Tulk* that refers to "use of land" and "attached to property" as implied recognition of "touch and concern" rule).

Some early commentators theorized that the omission of the technical elements of property law such as the "touch and concern" requirement indicated that *Tulk* was based on a contractual as opposed to a property theory. C. Clark, *supra*, *Real Covenants*, at 171–72 nn. 3 and 4; 3 H. Tiffany, *Real Property* § 861, at 489 (3d ed. 1939); Ames, "Specific Perform-

ance For and Against Strangers to Contract," 17 *Harv.L.Rev.* 174, 177–79 (1904); Stone, "The Equitable Rights and Liabilities of Strangers to the Contract," 18 *Colum.L.Rev.* 291, 294–95 (1918). Others contend that "touch and concern" is always, at the very least, an implicit element in any analysis regarding enforcement of covenants because "any restrictive easement necessitates some relation between the restriction and the land itself." McLoone, "Equitable Servitudes—A Recent Case and Its Implications for the Enforcement of Covenants Not to Compete," 9 *Ariz.L.Rev.* 441, 444, 447 n. 5 (1968). Still others explain the "touch and concern" omission on the theory that equitable servitudes usually involve negative covenants or promises on how the land should not be used. Thus, because those covenants typically do touch and concern the land, the equity courts did not feel the necessity to state "touch and concern" as a separate requirement. Berger, "Integration of the Law of Easements, Real Covenants and Equitable Servitudes," 43 *Wash. & Lee L.Rev.*, 337, 362 (1986). Whatever the explanation, the law of equitable servitudes did generally continue to diminish or omit the "touch and concern" requirement.

B. *New Jersey's treatment of noncompetitive covenants restraining the use of property*

Our inquiry of New Jersey law on restrictive property use covenants commences with a re-examination of the rule set forth in *Brewer v. Marshall & Cheeseman, supra*, 19 *N.J.Eq.* at 537, that a covenant will not run with the land unless it affects the physical use of the land. Hence, the burden side of a noncompetition covenant is personal to the covenantor and is, therefore, not enforceable against a purchaser. In *Brewer v. Marshall & Cheeseman*, the court objected to all noncompetition covenants on the basis of public policy and refused to consider them in the context of the doctrine of equitable servitudes. Similarly, in *National Union Bank at Dover v. Segur*, 39 *N.J.L.* 173 (Sup.Ct.1877), the court held that only the benefit of a noncompetition covenant would run with the land, but the burden would be personal to the covenantor. *See* 5 R. Powell,

supra, § 675[3] at 60–109. Because the burden of a noncompetition covenant is deemed to be personal in these cases, enforcement would be possible only against the original covenantor. As soon as the covenantor sold the property, the burden would cease to exist.

Brewer and *National Union Bank* have been subsequently interpreted as embodying the "unnecessarily strict" position that "while the benefit of [a noncompetition covenant] will run with the land, the burden of the covenant is necessarily personal to the covenantor." 5 *Powell, supra*, § 675[3] at 60–109. This blanket prohibition of noncompetition covenants has been ignored in more recent decisions that have allowed the burden of a noncompetition covenant to run, *see Renee Cleaners Inc. v. Good Deal Supermarkets of N.J.*, 89 *N.J.Super.* 186, 214 *A.*2d 437 (App.Div.1965) (enforcing at law covenant not to lease property for dry-cleaning business as against subsequent purchaser of land); *Alexander's v. Arnold Constable Corp.*, 105 *N.J.Super.* 14, 28, 250 *A.*2d 792 (Ch.1969) (enforcing promise entered into by prior holders of land not to operate department store as against current landowner). Nonetheless, *Brewer* may still retain some vitality, as evidenced by the trial court's reliance on it in this case.

The *per se* prohibition that noncompetition covenants regarding the use of property do not run with the land is not supported by modern real-covenant law, and indeed, appears to have support only in the *Restatement of Property* section on the running of real covenants, § 537 comment f. 5 *Powell, supra*, at § 675[3] at 60–109. Specifically, that approach is rejected in the *Restatement*'s section on equitable servitudes, see *Restatement of Property*, § 539 comment k (1944); *see also Whitinsville Plaza, Inc. v. Kotseas*, 378 *Mass.* 85, 95–96, 390 *N.E.*2d 243, 249 (1979) (overruling similarly strict approach inasmuch as it was "anachronistic" compared to modern judicial analysis of noncompetition covenants, which focuses on effects of covenant).

[1] Commentators also consider the *Brewer* rule an anachronism and in need of change, as do we. 5 *Powell, supra,* ¶ 678 at 192. Accordingly, to the extent that *Brewer* holds that a noncompetition covenant will not run with the land, it is overruled.

Plaintiff also argues that the "touch and concern" test likewise should be eliminated in determining the enforceability of fully negotiated contracts, in favor of a simpler "reasonableness" standard that has been adopted in most jurisdictions. That argument has some support from commentators, see, *e.g.*, Epstein, "Notice and Freedom of Contract in the Law of Servitudes," 55 *S.Cal.L.Rev.* 1353, 1359–61 (1982) (contending that "touch and concern" complicates the basic analysis and limits the effectiveness of law of servitudes), including a reporter for the *Restatement (Third) of Property*, see French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," 73 *Cornell L.Rev.* 928, 939 (1988) (arguing that "touch and concern" rule should be completely eliminated and that the law should instead directly tackle the "running" issue on public-policy grounds).

[2] New Jersey courts, however, continue to focus on the "touch and concern" requirement as the pivotal inquiry in ascertaining whether a covenant runs with the land. Under New Jersey law, a covenant that "exercise[s] [a] direct influence on the occupation, use or enjoyment of the premises" satisfies the "touch and concern" rule. *Caullett v. Stanley Stilwell & Sons, Inc.*, 67 *N.J.Super.* 111, 116, 170 *A.*2d 52 (App.Div.1961). The covenant must touch and concern both the burdened and the benefitted property in order to run with the land. *Ibid.*; *Hayes v. Waverly & Passaic R.R.*, 51 *N.J.Eq.* 3, 27 *A.* 648 (Ch. 1893). Because the law frowns on the placing of restrictions on the freedom of alienation of land, New Jersey courts will enforce a covenant only if it produces a countervailing benefit to justify the burden. *Restatement of Property*

as an initial matter that covenants not to compete do touch and concern the land. The courts then have examined explicitly the more important question of whether covenants are reasonable enough to warrant enforcement. The time has come to cut the gordian knot that binds this state's jurisprudence regarding covenants running with the land. Rigid adherence to the "touch and concern" test as a means of determining the enforceability of a restrictive covenant is not warranted. Reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law. We do not abandon the "touch and concern" test, but rather hold that the test is but one of the factors a court should consider in determining the reasonableness of the covenant.

A "reasonableness" test allows a court to consider the enforceability of a covenant in view of the realities of today's commercial world and not in the light of out-moded theories developed in a vastly different commercial environment. Originally strict adherence to "touch and concern" rule in the old English common-law cases and in *Brewer*, was to effectuate the then pervasive public policy of restricting many, if not all, encumbrances of the land. Courts today recognize that it is not unreasonable for parties in commercial-property transactions to protect themselves from competition by executing noncompetition covenants. Businesspersons, either as lessees or purchasers may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity. Hence, rather than limiting trade, in some instances, restrictive covenants may increase business activity.

[3] We recognize that "reasonableness" is necessarily a fact sensitive issue involving an inquiry into present business conditions and other factors specific to the covenant at issue. Nonetheless, as do most of the jurisdictions, we find that it is a better test for governing commercial transactions than are obscure anachronisms that have little meaning in today's commercial world. The pivotal inquiry, therefore, becomes what

factors should a court consider in determining whether such a covenant is "reasonable" and hence enforceable. We conclude that the following factors should be considered:

1. The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not at the time interfere with existing commercial laws, such as antitrust laws, or public policy.

2. Whether the covenant had an impact on the considerations exchanged when the covenant was originally executed. This may provide a measure of the value to the parties of the covenant at the time.

3. Whether the covenant clearly and expressly sets forth the restrictions.

4. Whether the covenant was in writing, recorded, and if so, whether the subsequent grantee had actual notice of the covenant.

5. Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable. *Alexander's v. Arnold Constable*, 105 *N.J.Super.* 14, 27, 250 *A.*2d 792 (Ch.Div.1969); *Cragmere Holding Corp. v. Socony Mobile Oil Co.*, 65 *N.J.Super.* 322, 167 *A.*2d 825 (App.Div.1961).

6. Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor. This may be the case in areas where there is limited space available to conduct certain business activities and a covenant not to compete burdens all or most available locales to prevent them from competing in such an activity. *Doo v. Packwood*, 265 *Cal. App.*2d 752, 71 *Cal.Rptr.* 477 (1968); *Kettle River R. v. Eastern Ry. Co.*, 41 *Minn.* 461, 43 *N.W.* 469 (1889).

7. Whether the covenant interferes with the public interest. *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 *Ill.* 230, 140 *N.E.* 840 (1923).

8. Whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable. *Welitoff v. Kohl*, 105 *N.J.Eq.* 181, 147 *A.* 390 (1929).

In applying the "reasonableness" factors, trial courts may find useful the analogous standards we have adopted in determining the validity of employee covenants not to compete after termination of employment. Although enforcement of such a covenant is somewhat restricted because of countervailing policy considerations, we generally enforce an employee non-competition covenant as reasonable if it "simply protects the legitimate interests of the employer imposes no undue hardship on the employee, and is not injurious to the public." *Solari Indus. v. Malady*, 55 *N.J.* 571, 576, 264 *A.*2d 53 (1970). We also held in *Solari* that if such a covenant is found to be overbroad, it may be partially enforced to the extent reasonable under the circumstances. *Id.* at 585, 264 *A.*2d 53. That approach to the enforcement of restrictive covenants in deeds offers a mechanism for recognizing and balancing the legitimate concerns of the grantor, the successors in interest, and the public.

The concurrence maintains that the initial validity of the covenant is a question of contract law while its subsequent enforceability is one of property law. *Post* at 221, 579 *A.*2d at 300. The result is that the concurrence uses reasonableness factors in construing the validity of the covenant between the original covenantors, but as to successors-in-interest, claims to adhere strictly to a "touch and concern" test. *Post* at 222, 579 *A.*2d at 301. Such strict adherence to a "touch and concern" analysis turns a blind eye to whether a covenant has become unreasonable over time. Indeed many past illogical and contorted applications of the "touch and concern" rules have resulted because courts have been pressed to twist the rules of "touch and concern" in order to achieve a result that comports with public policy and a free market. Most jurisdictions acknowledge the reasonableness factors that affect enforcement of a covenant concerning successors-in-interest, instead of en-

gaging in the subterfuge of twisting the touch and concern test to meet the required result. New Jersey should not remain part of the small minority of States that cling to an anachronistic rule of law. *Supra* at 210, 579 *A.*2d at 295.

[4] There is insufficient evidence in this record to determine whether the covenant is reasonable. Nevertheless, we think it instructive to comment briefly on the application of the "reasonableness" factors to this covenant. We consider first the intent of the parties when the covenant was executed. It is undisputed that when plaintiff conveyed the property to Katz, it intended that the George Street store would not be used as a supermarket or grocery store for a period of forty years to protect his existing business at the Elizabeth Street store from competition. Plaintiff alleges that the purchase price negotiated between it and Katz took into account the value of the restrictive covenant and that Katz paid less for the property because of the restriction. There is no evidence, however, of the purchase price. It is also undisputed that the covenant was expressly set forth in a recorded deed, that the Authority took title to the premises with actual notice of the restrictive covenant, and, indeed, that all the defendants, including C–Town, had actual notice of the covenant.

The parties do not specifically contest the reasonableness of either the duration or area of the covenant. Aspects of the "touch and concern" test also remain useful in evaluating the reasonableness of a covenant, insofar as it aids the courts in differentiating between promises that were intended to bind only the individual parties to a land conveyance and promises affecting the use and value of the land that was intended to be passed on to subsequent parties. Covenants not to compete typically do touch and concern the land. In noncompetition cases, the "burden" factor of the "touch and concern" test is easily satisfied regardless of the definition chosen because the covenant restricts the actual use of the land. *Berger, supra,* 52 *Wash.L.Rev.* at 872. The Appellate Division properly con-

cluded that the George Street store was burdened. However, we disagree with the Appellate Division's conclusion that in view of the covenant's speculative impact, the covenant did not provide a sufficient "benefit" to the Elizabeth Street property because it burdened only a small portion (George Street store) of the "market circle" (less than one-half acre in a market circle of 2000 acres).

The size of the burdened property relative to the market area is not a probative measure of whether the Elizabeth store was benefitted. Presumably, the use of the Elizabeth Street store as a supermarket would be enhanced if competition were lessened in its market area. If plaintiff's allegations that the profits of the Elizabeth Street store increased after the sale of the George Street store are true, this would be evidence that a benefit was "conveyed" on the Elizabeth Street store. Likewise, information that the area was so densely populated, that the George Street property was the only unique property available for a supermarket, would show that the Elizabeth Street store property was benefitted by the covenant. In this connection the C–Town executive in his deposition noted that the George Street store location "businesswise was promising because there's no other store in town." Such evidence, however, also should be considered in determining the "reasonableness" of the area covered by the covenant and whether the covenant unduly restrained trade.

Defendants' primary contention is that due to the circumstances of the neighborhood and more particularly the circumstances of the people of the neighborhood, plaintiff's covenant interferes with the public's interest. Whether that claim is essentially that the community has changed since the covenant was enacted or that the circumstances were such that when the covenant was enacted, it interfered with the public interest, we are unable to ascertain from the record. "Public interest" and "changed circumstances" arguments are extremely fact-sensitive. The only evidence that addresses those issues, the three

affidavits of Mr. Keefe, Mr. Nero and Ms. Scott, are insufficient to support any finding with respect to those arguments.

The fact-sensitive nature of a "reasonableness" analysis make resolution of this dispute through summary judgment inappropriate. We therefore remand the case to the trial court for a thorough analysis of the "reasonableness" factors delineated herein.

The trial court must first determine whether the covenant was reasonable at the time it was enacted. If it was reasonable then, but now adversely affects commercial development and the public welfare of the people of New Brunswick, the trial court may consider whether allowing damages for breach of the covenant is an appropriate remedy. C–Town could then continue to operate but Davidson would get damages for the value of his covenant. On the limited record before us, however, it is impossible to make a determination concerning either reasonableness of the covenant or whether damages, injunctive relief, or any relief is appropriate.

In sum, we reject the trial court's conclusion because it depends largely on the continued vitality of *Brewer*, which we hereby overrule. *Supra* at 201–202, 579 *A*.2d at 290–291. Likewise, we reject the Appellate Division's reliance on the "touch and concern" test. Instead, the proper test to determine the enforceability of a restricted noncompetition covenant in a commercial land transaction is a test of "reasonableness," an approach adopted by a majority of the jurisdictions.

III

[5] The other issue before us concerns whether the lease granted by the Housing Authority to C–Town constitutes an impermissible gift of public property in violation of the State Constitution. The five-year term lease was conditioned on the operation of a full-service supermarket in exchange for one dollar a year and ten thousand dollars in improvements to the property.

The New Jersey Constitution of 1947, article eight, section three, paragraphs two and three provides:

> 2. No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation.
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> 3. No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever

Those provisions, which prohibit donations of public funds for private use, were taken from the 1844 Constitution, as amended in 1875. *Hill v. Summit*, 64 *N.J.Super.* 522, 166 *A.*2d 610 (Law Div.1960). They were precipitated by a number of abusive practices that occurred during the nineteenth century when railroads and other private corporations were provided direct public assistance to the serious detriment of the taxpayers under the guise of "encouraging development." *Roe v. Kervick*, *supra*, 42 *N.J.* at 206, 199 *A.*2d 834. The provisions were intended to signal "the retreat to a fundamental doctrine of government, *i.e.*, that public money should be raised and used only for public purposes." *Id.* at 207, 199 *A.*2d 834.

In *Roe v. Kervick*, *supra*, 42 *N.J.* at 191, 199 *A.*2d 834, we established the tests to ascertain whether a public entity's action in lending funds to private entities is violative of the constitutional provisions. In *Roe* we held that where a governmental entity contracts with a private entity in order to carry out a traditional public-government function, and where the contractual relationship is such that the governmental entity, as a practical matter, completely controls the private entity's actions in performing that public service, the fact that the private entity also derives an incidental benefit or profit will not invalidate the agreement.

The issue in *Roe* was whether the New Jersey State Area Redevelopment Assistance Act (Redevelopment Act), which authorized government loans to finance private for-profit redevel-

opment projects aimed at providing job opportunities in economically distressed areas in New Jersey was constitutional under N.J. Constitution of 1947, article eight, section 3, paragraphs two and three. To decide this case, the Court posed the following two questions:

> (1) Is legislative provision for financial aid to relieve unemployment a public purpose, and (2) if so, is the method of relief provided in this instance so consonant with the accomplishment of that public purpose as to be beyond the limitations on the use of public money laid down by Article VIII of the Constitution?
>
> [42 *N.J.* at 212, 199 *A.*2d 834].

In answering the first question, the Court established a two-part test to define the concept of public purpose. The activity must be one that "serves a benefit to the community as a whole, and which, at the same time is directly related to the function of government." *Id.* at 207, 199 *A.*2d 834. The Court recognized however that the concept of a public purpose "cannot be static in its implications," and that

> [t]o be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare. [*Ibid.* (citations omitted).]

After a detailed examination of the design and scheme of the Redevelopment Act, the Court first concluded that the purpose to "relieve substantial and persistent unemployment" in distressed areas of New Jersey constituted a "public purpose." It benefitted the public and was directly related to the function of government. The Court then addressed whether the means of relief was so consonant with the purpose of the statute to be within the constitutional limits imposed by Article VIII of the Constitution. Again, after a detailed examination of the Redevelopment Act, the Court concluded that the scope and public purpose of the agency's agreed undertaking was clearly delineated and so circumscribed by the federal and state acts, that

> by virtue of the contract, the private operator is so closely identified with accomplishment of the public purpose, and his business activity is so strictly

pointed in that direction, that for practical purposes he represents the controlled means by which the government accomplished a proper objective.
[*Ibid.* at 219, 199 *A.*2d 834].

The Court's language in *Roe* is instructive of the strict standards that public entities must meet if their expenditures are to be deemed constitutional under Article eight, section three, paragraphs two and three:

When the character of the contract is studied in light of the scope and restrictions of the federal and State laws, the fact becomes evidence that although the agency establishing the project is a private one, it is so circumscribed in its operation as to be considered in a sense a controlled instrumentality with respect to its use of the limited public financial assistance. Obviously the funds of the State or a county or municipality could not be loaned to a private agency to be used as the agency pleased. Clearly the Constitution would stand in the way. But when the loan is granted for an obvious public purpose and its use confined to the execution of that purpose through a reasonable measure of control by a public authority by means of contractual stipulation, statutory and administrative regulation, the private agency takes on the form of a special public agent for the paramount purpose of devoting the money to relief of unemployment.
[*Id.* at 222, 199 *A.*2d 834 (citations omitted).]

The present situation is not totally analogous to that in *Roe*. In that case, the public purpose clearly was set forth in the statute itself and directly related to a function of government. The acquisition of land to facilitate the operation of a supermarket is not a traditional governmental function. Yet, there may be ways to justify this kind of government involvement or subsidy. In *N.J. Housing & Mortgage Fin. Agency v. Moses*, 215 *N.J.Super.* 318, 324, 521 *A.*2d 1307 (App.Div.1987), the court decided that the exercise of eminent domain for the purpose of constructing a shopping center was justifiable. A shopping center would, the court determined, enhance the livability of publicly financed residential properties in the area by providing food and other services to the residents of those properties. Likewise, there may be a legitimate government purpose involved in the operation of C-Town in this context.

The record in this case is not sufficient to establish that the operation of this supermarket constitutes such a purpose. The evidence consists solely of three conclusory and vague affida-

vits. The affidavits state in very general terms that there is need for a supermarket for some unspecified number of low and middle-income residents who presumably do not drive and must take taxicabs or public transportation to the Elizabeth Street store two miles away, or shop at nearer but more expensive convenience stores. There is a need for more documentation of these assertions.

Accordingly, we find that there is insufficient evidence on this record to establish that the purchase, lease, and operation of the George Street property as a supermarket constituted a "public purpose" under the *Roe* standard. Likewise, we find that there are insufficient facts to support a conclusion that the Authority's means of accomplishing the public purpose were sufficiently restricted. The lease between C–Town and the Authority contains none of the detailed restrictions evident in *Roe* that made that private agency an arm of the government for purposes of carrying out a traditional government purpose. This lease may fall short of fulfilling the public good.

[6] We reject plaintiff's assertion, however, that *Scott v. Town of Bloomfield*, 94 *N.J.Super.* 592, 229 *A.*2d 667 (Law Div.1967), *aff'd*, 98 *N.J.Super.* 321, 237 *A.*2d 297 (App.Div.), *appeal dismissed*, 52 *N.J.* 473, 246 *A.*2d 129 (1968), and *East Orange v. Board of Water Commissioners*, 79 *N.J.Super.* 363, 191 *A.*2d 749 (App.Div.), *aff'd on other grounds*, 41 *N.J.* 6, 194 *A.*2d 459 (1963), command that the public entity receive fair consideration for the lease. Neither case is on point. Moreover, a public entity need not receive fair consideration for a lease so long as the activity sponsored is for a public purpose and the private entity represents the controlled means by which the government accomplishes the public purpose.

We remand to the trial court to determine whether the purchase, lease, and operation of the supermarket constituted a public purpose, and, if so, whether the Housing Authority used justifiable means to attract a supermarket to the area of downtown New Brunswick.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

POLLOCK, J., concurring.

The Court reverses the Appellate Division's affirmance of the Chancery Division's grant of summary judgment invalidating the restrictive covenant and remands the matter to the Chancery Division for a plenary hearing. Although I concur in the judgment of remand, I believe it should be on different terms.

My basic difference with the majority is that I believe the critical consideration in determining the validity of this covenant is whether it is reasonable as to scope and duration, a point that has never been at issue in this case. Nor has there ever been any question whether the original parties to the covenant, Davidson Bros., Inc. (Davidson), and D. Katz & Sons, Inc. (Katz) intended that the covenant should run with the land. Likewise, the New Brunswick Housing Authority (the Authority) and C–Town have never disputed that they did not have actual notice of the covenant or that there was privity between them and Katz. Finally, the defendants have not contended that the covenant constitutes an unreasonable restraint on trade or that it has an otherwise unlawful purpose, such as invidious discrimination. Davidson, moreover, makes the uncontradicted assertion that the covenant is a burden to the George Street property and benefits the Elizabeth Street property. Hence, the covenant satisfies the requirement that it touch and concern the benefitted and burdened properties.

The fundamental flaw in the majority's analysis is in positing that an otherwise-valid covenant can become invalid not because it results in an unreasonable restraint on trade, but because invalidation facilitates a goal that the majority deems worthy. Considerations such as "changed circumstances" and "the public interest," when they do not constitute such a restraint, should not affect the enforceability of a covenant. Instead, they should relate to whether the appropriate method

of enforcement is an injunction or damages. A court should not declare a noncompetition covenant invalid merely because enforcement would lead to a result with which the court disagrees. This leads me to conclude that the only issue on remand should be whether the appropriate remedy is damages or an injunction.

Enforcement of the restriction by an injunction will deprive the downtown residents of the convenience of shopping at the George Street property. Refusal to enforce the covenant, on the other hand, will deprive Davidson of the benefit of its covenant. Thus, the case presents a tension between two worthy objectives: the continued operation of the supermarket for the benefit of needy citizens, and the enforcement of the covenant. An award of damages to Davidson rather than the grant of an injunction would permit the realization of both objectives.

–I–

I begin by questioning the majority's formulation and application of a reasonableness test for determining whether the covenant runs with the land. The law has long distinguished between the validity of a covenant between original-contracting parties from the enforceability of a covenant against the covenantor's successor-in-interest. Initial validity is a question of contract law; enforceability against subsequent parties is one of property law. *Caullett v. Stanley Stilwell & Sons*, 67 *N.J.Super.* 111, 116, 170 *A.*2d 52 (App.Div.1961); R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* 467 (1984) (Cunningham). That distinction need not foreclose a subsequent owner of the burdened property from challenging the validity of the contract between the original parties. The distinction, however, sharpens the analysis of the effect of the covenant.

In this case, the basic issue is enforceability of the covenant against the Authority and C–Town, successors in interest to

Katz. Thus, the only relevant consideration is whether the covenant "touches and concerns" the benefitted and burdened properties. For the Chancery Division, the critical issue was "whether the restriction burdens the land in the hands of the Authority." As the majority points out, "[i]n contrast to the trial court's decision, the Appellate Division's rationale was premised on the failure of the benefit of the covenant to run, not of the burden." *Ante* at 202, 579 *A.*2d at 291. The majority correctly disagrees with the Appellate Division's rationale, properly observing that a covenant can provide a benefit even without burdening most of the properties in the relevant market area. *Ante* at 214, 579 *A.*2d at 297. Concerning the running of the burden on the George Street property, the majority views *Brewer v. Marshall & Cheeseman*, 19 *N.J.Eq.* 537 (E. & A.1868), as an anachronism. It properly overrules the holding of *Brewer* "that a noncompetition covenant will not run with the land * * *." *Ante* at 207, 579 *A.*2d at 293. Continuing, the majority observes that in most jurisdictions the " 'touch and concern' test has * * * ceased to be * * * intricate and confounding," and that "[c]ourts have decided as an initial matter that covenants not to compete do touch and concern the land." *Ante* at 209, 579 *A.*2d at 294. Instead of concluding its analysis, the majority adds: "We do not abandon the 'touch and concern' test, but rather hold that the test is but one of the factors a court should consider in determining the reasonableness of the covenant." *Ante* at 210, 579 *A.*2d at 295.

The Court can decide the present case without introducing a new test. On the present record, no question exists about the running of the benefit of the covenant. First, the party seeking to enforce the covenant is Davidson, the original leaseholder, not a successor in interest, of the Elizabeth Street property. Second, as the language of the covenant indicates, the original contracting parties, Davidson and Katz, indicated that the covenant would run with the land. Third, Davidson makes the uncontradicted assertions that both stores were unprofitable before the sale, that the Elizabeth Street store after the sale of

the George Street property enjoyed a twenty-per-cent sales increase, and that the reopening of the George Street property caused it to suffer a loss of income. Finally, as the majority recognizes, the lower courts erred in concluding that the covenant did not "touch and concern" the burdened and benefitted properties. *Ante* at 213, 579 *A.*2d at 296.

It is virtually inconceivable that the covenant does not benefit the Elizabeth Street property. New Jersey courts have declared variously that the benefit "must exercise direct influence upon the occupation, use or enjoyment of the premises," *Caullett, supra*, 67 *N.J.Super.* at 116, 170 *A.*2d 52, and that the covenant must confer "a direct benefit on the owner of land by reason of his ownership," *National Union Bank at Dover v. Segur*, 39 *N.J.L.* 173, 186 (Sup.Ct.1877). Scholars have written that a covenant's benefit touches and concerns land if it renders the owner's interest in the land more valuable, Bigelow, *The Content of Covenants in Leases*, 12 *Mich.L.Rev.* 639, 645 (1914), or if "the parties as laymen and not as lawyers" would naturally view the covenant as one that aids "the promisee as landowner," C. Clark, *Real Covenants and Other Interests Which Run with the Land* 99 (2d ed. 1947) (Clark); *see also* 5 R. Powell & P. Rohan, *Powell on Real Property* ¶ 673[2][a] (1990) (Powell) (inclining towards Clark's view). Like most courts, leading scholars, Powell, *supra*, § 675[3]; Cunningham, *supra*, at 474–75; and Clark, *supra*, at 106, believe that under the "touch and concern" test, the benefit of non-competition covenants should run with the land.

The conclusion that this covenant "touches and concerns" the land should end the inquiry about enforceability against the Authority and C–Town. The majority, however, holds that the "touch and concern" test is "but one of the factors a court should consider in determining the reasonableness of the covenant." *Ante* at 210, 579 *A.*2d at 295. The majority's inquiry about reasonableness, however, confuses the issue of validity of the original contract between Davidson and Katz with enforceability against the subsequent owner, the Authority. This

confusion of validity with enforceability threatens to add uncertainty to an already troubled area of the law. As explained by one leading authority, "[t]he judicial reaction to this confusion [in the law of covenants and equitable servitudes] has often been to state the law so as to achieve the desired result in a particular case. Obviously, this has caused frequent misstatements of the law, which has deepened the overall confusion." Powell, *supra*, ¶ 670[2].

The majority inaccurately asserts, *ante* at 208, 579 *A.*2d at 294, that most jurisdictions "have focused on whether the covenant is reasonable enough to warrant enforcement." Not one case cited by the majority has concluded that a covenant that is reasonable against the original covenantor would be unreasonable against the covenantor's successor who takes with notice. For example, in *Hercules Powder Co. v. Continental Can Co.*, 196 *Va.* 935, 945, 86 *S.E.*2d 128, 133 (1955), only after first concluding that the restriction was reasonable did the court consider "whether it is enforceable by Continental Can, an assignee of the original covenantee, against Hercules, an assignee of the original covenantor." In determining that Hercules was subject to the restriction, the court considered only whether it purchased the land with notice of the restriction. *Id.* at 946–48, 86 *S.E.*2d at 134–35. Similarly, in *Quadro Stations v. Gilley*, 7 *N.C.App.* 227, 234, 172 *S.E.*2d 237, 242 (1970), the court first concluded that the restriction was valid, and then held that it was enforceable against defendants, successors in interest to the original covenanting parties. Nothing in the opinion implies that a restriction that was reasonable between the original parties would be unenforceable against a purchaser of the burdened property who bought with notice. *Doo v. Packwood*, 265 *Cal.App.*2d 752, 756, 71 *Cal. Rptr.* 477, 481 (1968), is likewise unavailing to the majority. There, when purchasing a lot on which Doo had operated a grocery store, Packwood agreed to a noncompetition covenant. After concluding that the covenant was reasonable as between the original parties, the court found that it would be binding on

a future purchaser with notice. *Ibid.* In effect, future purchasers would be bound so long as Doo continued to operate a competitive grocery store. *Ibid.* To conclude, the cited cases hold that a reasonable noncompetition covenant binding on the original covenantor likewise binds a subsequent purchaser with notice. Hence, the majority misperceives the focus of the out-of-state cases. The result is that the majority's reasonableness test introduces unnecessary uncertainty in the analysis of covenants running with the land.

As troublesome as uncertainty is in other areas of the law, it is particularly vexatious in the law of real property. The need for certainty in conveyancing, like that in estate planning, is necessary for people to structure their affairs. Covenants that run with the land can affect the value of real property not only at the time of sale, but for many years thereafter. Consequently, vendors and purchasers, as well as their successors, need to know whether a covenant will run with the land. The majority acknowledges that noncompetition covenants play a positive role in commercial development. *Ante* at 210, 579 *A.*2d at 295. Notwithstanding that acknowledgement, the majority's reasonableness test generates confusion that threatens the ability of commercial parties and their lawyers to determine the validity of such covenants. This, in turn, impairs the utility of noncompetition covenants in real estate transactions.

As between the vendor and purchaser, a noncompetition covenant generally should be treated as valid if it is reasonable in scope and duration, *Irving Inv. Corp. v. Gordon*, 3 *N.J.* 217, 221, 69 *A.*2d 725 (1949); *Heuer v. Rubin*, 1 *N.J.* 251, 256–57, 62 *A.*2d 812 (1949); *Scherman v. Stern*, 93 *N.J.Eq.* 626, 630, 117 *A.* 631 (E. & A.1922), and neither an unreasonable restraint on trade nor otherwise contrary to public policy. A covenant would contravene public policy if, for example, its purpose were to secure a monopoly, *Quadro Stations, supra*, 7 *N.C.App.* at 235, 172 *S.E.*2d at 242; *Hercules Powder Co., supra*, 196 *Va.* at 944–45, 86 *S.E.*2d at 132–33, or to carry out an illegal object,

such as invidious discrimination, *see, e.g., N.J.S.A.* 46:3–23 (declaring restrictive covenants in real estate transactions void if based on race, creed, color, national origin, ancestry, marital status, or sex).

Applying those principles to the validity of the agreement between Davidson and Katz, I find this covenant enforceable against defendants. The majority acknowledges that "[t]he parties do not specifically contest the reasonableness of either the duration or the area of the covenant." *Ante* at 213, 579 *A.*2d at 296. I agree. The covenant is limited to one parcel, the George Street property. Defendants do not assert that Davidson has restricted or even owns other property in New Brunswick. Furthermore, they do not allege that other property is not available for a supermarket. In brief, the Authority has not alleged that at the time of the sale from Davidson to Katz, or even at present, the George Street property was the only possible site in New Brunswick for a supermarket. Consequently, the covenant may not be construed to give rise to a monopoly. In all of New Brunswick it restricts a solitary one-half acre tract from use for a single purpose. Indeed, the record demonstrates that the Authority explored other options, including expansion of a food cooperative and increasing the product lines at nearby convenience stores. Nothing in the record supports the conclusion that the covenant might be unreasonable respecting space.

Nor does anything indicate that the forty-year length of the restriction between Davidson and Katz is unreasonable in time. As we have stated, "where the space contained in the covenant is reasonable and proper there need be no limitation as to time." *Rubin, supra,* 1 *N.J.* at 256–57, 62 *A.*2d 812. That statement echoes the words "certainly it is no objection to an agreement not to compete with a mercantile business that the restraint is unlimited in point of time when [as here] it is reasonably limited in point of space." *Stern, supra,* 93 *N.J.Eq.* at 630, 117 *A.* 631. To sustain the subject covenant we need not go so far as to say that a covenant could never be unreason-

ably long. In an appropriate case, a court, drawing on the analogy to restrictive covenants in employment contracts, might reform a covenant so that it lasts only for a reasonable time. *Solari Indus. v. Malady*, 55 *N.J.* 571, 264 *A.*2d 53 (1970). This is not such a case.

Here, Davidson holds a lease on the Elizabeth Street property for a term of twenty years, with two renewable five-year terms. Those lease terms are substantially, if not precisely, coextensive with the term of the covenant. If, on remand, the Chancery Division should find that the additional ten-year period is not enforceable by Davidson, it should also find that the restriction is valid for the thirty-year period during which Davidson's lease may run. In sum, I believe that the covenant is reasonable at least for the term of Davidson's lease.

To the extent that noncompetition covenants in real estate transactions are deemed valid if reasonable in scope and duration, they are more readily upheld than similar covenants arising out of employment contracts. *Solari Indus., supra*, 55 *N.J.* at 576, 264 *A.*2d 53. In this regard, Williston points out that "[r]estriction upon the use of real property is considered less likely to affect the public interest adversely than restraint of the activities of individual parties and accordingly, such covenants are usually held not contrary to public policy." 14 *Williston on Contracts* § 1642 (3d ed. 1972) (Williston). Nothing in the record supports the conclusion that when made or at present the subject covenant was an unreasonable restraint on trade or otherwise contrary to public policy.

Certain of the factors identified by the majority must be present for a covenant to run apart from the considerations of reasonableness. Such factors are the intent of the parties that the covenant run, clarity of the express restrictions, whether the covenant was in writing, and whether it was recorded. *Caullett, supra*, 67 *N.J.Super.* at 116, 170 *A.*2d 52; *Petersen v. Beekmere*, 117 *N.J.Super.* 155, 166–67, 283 *A.*2d 911 (Ch.Div. 1971); Clark, *supra*, at 94; Cunningham, *supra*, at 470. As

previously indicated, all those factors are present in this case. If they had not been present, the covenant would have been unenforceable without reference to a reasonableness test. Duplicating those factors in such a test is counterproductive.

The majority's three remaining factors also pose troubling problems. Without citing any authority, the majority invites review of "[w]hether the covenant had an impact on the considerations exchanged when the covenant was originally executed." *Ante* at 210, 579 *A.*2d at 295. As the majority acknowledges, however, Davidson has made the uncontradicted assertion "that the purchase price negotiated between it and Katz took into account the value of the restrictive covenant and that Katz paid less for the property because of the restriction." *Ante* at 213, 579 *A.*2d at 296.

In contract matters, courts ordinarily concern themselves with the existence, not the adequacy, of consideration. *Kampf v. Franklin Life Ins. Co.*, 33 *N.J.* 36, 43, 161 *A.*2d 717 (1960). Because a noncompetition covenant in a commercial-real-estate sale involves the sale of property in exchange for the payment of the purchase price and the noncompetition covenant, it would be difficult to argue that the covenant was not supported by consideration. In fact, the majority does not cite to a single case in which a noncompetition covenant in a real-estate transaction has been declared invalid for lack of consideration.

Recognizing that the covenant should run is consistent with the intent of the contracting parties and reflects the economic consequences of their transaction. As Chief Justice Beasley wrote in *National Union Bank at Dover, supra*, 39 *N.J.L.* at 187, "[s]ince these parties most manifestly have thought that the stipulation in question gave additional value to the property, why, and on what ground, should the court declare that such was not the case?" *See DeGray v. Monmouth Beach Club House Co.*, 50 *N.J.Eq.* 329, 333, 24 *A.* 388 (Ch. 1892) ("The equity thus enforced arises from the inference that the covenant has, to a material extent, entered into the consideration of

the purchase, and that it would be unjust to the original grantor to permit the covenant to be violated."); *Tulk v. Moxhay*, 2 *Phil.* 774, 777–78, 41 *Eng.Rep.* 1143, 1144 (1848) ("Of course, the price would be affected by the covenant and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.").

The majority's other two factors are "whether the covenant interferes with the public interest," and "whether, even if the covenant was reasonable at the time it was executed, 'changed circumstances' now make the covenant unreasonable." *Ante* at 212, 579 *A.*2d at 295. In this regard, the majority adds that

> [t]he trial court must first determine whether the covenant was reasonable at the time it was enacted. If it was reasonable then, but now adversely affects commercial development and the public welfare of the people of New Brunswick, the trial court may consider whether allowing damages is an appropriate remedy. C–Town could continue to operate but Davidson would get damages for the value of his [sic] covenant. On the limited record before us, however, it is impossible to make a determination as to the reasonableness of the covenant or whether damages, injunctive relief, or any relief is appropriate. [*Ante* at 215, 579 *A.*2d at 297.]

Implicit in the statement is the notion that a court might declare a covenant invalid even if it is reasonable in scope and duration, does not have a pernicious objective, and creates neither a monopoly nor an unreasonable restraint of trade. In brief, merely because it does not like a covenant, a court may find it invalid. This implication infects the usefulness of such covenants and represents an unwarranted intrusion of the judiciary in private transactions. The statement also points up the problem of blurring the contractual and property aspects of the covenant. *Supra* at 221–222, 579 *A.*2d at 300–301. Fairly read, the factors are not relevant to the determination of enforceability, as the Court initially indicated, but to the determination whether the appropriate relief is the award of damages or an injunction. See *Welitoff v. Kohl*, 105 *N.J.Eq.* 181, 189, 147 *A.* 390 (E. & A.1929).

The decided cases suggest that changed circumstances justify the refusal to enforce an otherwise-enforceable covenant only when the change defeats the covenant's purpose. Thus, in *Doo, supra*, 265 *Cal.App.*2d at 756, 71 *Cal.Rptr.* at 481, a claim of changed circumstances could not defeat a restrictive covenant against a grocery store as long as the benefitted party continued to operate a competitive store on another property. Analogous New Jersey cases imply a similar conclusion. In *Weinstein v. Swartz*, 3 *N.J.* 80, 89, 68 *A.*2d 865 (1949), when business development elsewhere did not affect the residential character of the neighborhood in which the burdened property was located, the Court recognized the continuing validity of restrictions limiting the use of the property to a single-family residence. Similarly, in *Leasehold Estates v. Fulbro Holding Co.*, 47 *N.J.Super.* 534, 565, 136 *A.*2d 423 (App.Div.1957), the court refused to enforce a 103–year–old covenant limiting the use of the front of an alley to barns and stables because enforcement would not provide the "contemplated benefit to the covenantee."

Perhaps the majority's opinion is best read as holding that Davidson is entitled to damages but not an injunction if the covenant was reasonable when formed, but now adversely affects the public welfare of the people of New Brunswick. *See Gilpin v. Jacob Ellis Realties*, 47 *N.J.Super.* 26, 31–34, 135 *A.*2d 204 (App.Div.1957). Such a holding would ensure that Davidson will not be "left without any redress; * * * [it will be] given what plaintiffs are given in many types of cases—relief measured, so far as the court reasonably may do so, in damages." *Id.* at 34, 135 *A.*2d 204.

Nothing in the record provides any basis for finding that in the six years that elapsed between 1980, when Davidson sold to Katz, and 1986, when Katz sold to the Authority, circumstances changed so much that they render the covenant unenforceable. The record is devoid of any showing that anything has happened since 1980 that has deprived the Elizabeth Street store of the covenant's benefit. Notions of "changed circumstances"

and the "public interest" thinly veil the Authority's attempt to avoid compensating Davidson for the cost of the lost benefit of an otherwise-enforceable covenant. I am left to wonder whether the majority would so readily condone the Authority's taking of Davidson's property if the interest taken were one in fee simple and not a restrictive covenant. It is wrong to take Davidson's covenant without compensation just as it would be wrong to take its fee interest without paying for it. Shopkeepers in malls throughout the state will be astonished to learn that noncompetition covenants that they have so carefully negotiated in their leases are subject to invalidation because they run counter to a court's perception of "changed circumstances" and the "public interest."

-II-

For me the critical issue is whether the appropriate remedy for enforcing the covenant is damages or an injunction. Ordinarily, as between competing land users, the more efficient remedy for breach of a covenant is an injunction. R. Posner, *Economic Analysis of Law* 62 (1986) (Posner); R. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 *S.Cal.L.Rev.* 1353–67 (1962); Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv.L.Rev.* 1089, 1118 (1972) (Calabresi and Melamed). *But see* Posner, *supra*, at 59; Calabresi and Melamed, *supra*, at 119 (discussing situations in which damages are a more efficient remedy than an injunction). If Katz still owned the George Street property, the efficient remedy, therefore, would be an injunction. The Authority, which took title with knowledge of the covenant, is in no better position than Katz insofar as the binding effect of the covenant is concerned. Although an injunction might be the most efficient form of relief, it would however deprive the residents of access to the George Street store.

The economic efficiency of an injunction, although persuasive, is not dispositive. The right rule of law is not necessarily the one that is most efficient. *Saint Barnabas Medical Center v. Esser County*, 111 *N.J.* 67, 88, 543 *A.*2d 34 (1988) (Pollock, J., concurring); *see also* R. Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1, 19 (1960). In other cases, New Jersey courts have allowed cost considerations other than efficiency to affect the award of a remedy.

For example, in *Gilpin*, *supra*, 47 *N.J.Super.* 26, 135 *A.*2d 204, the court refused to approve an injunction, but upheld an award of damages to the victim of a breach of a covenant. The property right at issue was a covenant restricting the building of any structure more than fifteen feet tall within four feet of one of the parties' common boundaries. Defendant, a builder, was the successor to the land of the original covenantor. Plaintiff succeeded to ownership of the land originally benefitted by the covenant. Defendant and plaintiff were neighboring landowners. Defendant breached the covenant. Remodeling the structure would have cost defendant $11,500. The trial court had found that the breach harmed plaintiff to the extent of $1,000 in damages. Invoking the "doctrine of relative hardship," the Appellate Division held that the differences in these two figures were "so grossly disproportionate in amount as to justify the denial of the mandatory injunction." 47 *N.J.Super.* at 35–36, 135 *A.*2d 204. At the same time, the Appellate Division upheld the $1,000–damages award to plaintiff. *Id.* at 36, 135 *A.*2d 204. Thus, the court concluded that the appropriate remedy for enforcing the covenant was an award of damages, not an injunction.

Injunctions, moreover, are ordinarily issued in the discretion of the court. *Id.* at 29, 135 *A.*2d 204. Hence, "[t]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." *Sears Roebuck & Co. v. Camp*, 124 *N.J.Eq.* 403, 412, 1 *A.*2d 425 (E. & A.1938) (quoting Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941)). In the

exercise of its discretion, a court may deny injunctive relief when damages provide an available adequate remedy at law. *See Board of Educ., Borough of Union Beach v. N.J.E.A.*, 53 *N.J.* 29, 43, 247 *A.*2d 867 (1968).

In the past, however, an injunction in cases involving real covenants and equitable servitudes "was granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained *any* pecuniary damages, [was] wholly immaterial." J.N. Pomeroy, *Equity Jurisprudence*, § 1342 (5th ed. 1941). The roots of that tradition are buried deep in the English common law and are not suited for modern American commercial practices. In brief, the unswerving preference for injunctive relief over damages is an anachronism.

At English common law, as between grantors and grantees, covenants running with the land violated the public policy against encumbrances. *See* Powell, *supra*, § 670 n. 27 (citing *Keppell v. Bailey*, 39 *Eng.Rep.* 1042 (Ch. 1834)). The policy becomes understandable on realizing that England originally did not provide a system for recording encumbrances, such as restrictive covenants. *See* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 *Minn.L.Rev.* 167, 186 (1970). Without a recording system, a subsequent grantee might not receive actual or constructive notice of such a covenant. As the Court points out, "[a]dequate notice obliterated any express requirement of 'touch and concern.'" *Ante* at 204, 579 *A.*2d at 292.

For centuries, New Jersey has provided a means for recording restrictive covenants. Hence, the policy considerations that counselled against enforcement of restrictive covenants at English common law do not apply in this state. In the absence of an adequate remedy at law, moreover, the English equity courts filled the gap by providing equitable relief, such as an injunction. *Tulk, supra*, 2 *Phil.* 774, 41 *Eng.Rep.* 1143 (discussed by the majority, *ante* at 204, 579 *A.*2d at 292.) In this

state, unlike in England, covenants between grantor and grantee are readily enforceable. *Roehrs v. Lees*, 178 *N.J.Super.* 399, 429 *A.*2d 388 (App.Div.1981) (covenant between neighboring property owners arising from a grantor-grantee relationship between original covenanting parties enforceable; matter remanded to trial court to determine whether damages or injunction was appropriate); *Gilpin, supra*, 47 *N.J.Super.* at 29, 135 *A.*2d 204. Hence, the need for injunctive relief, as distinguished from damages, is less compelling in New Jersey than at English common law, where damages were not always available. I would rely on the rule that a court should not grant an equitable remedy when damages are adequate. *N.J. E.A., supra*, 53 *N.J.* at 43, 247 *A.*2d 867.

Here, moreover, the Authority holds a trump card not available to all other property owners burdened by restrictive covenants—the power to condemn. By recourse to that power, the Authority can vitiate the injunction by condemning the covenant and compensating Davidson for its lost benefit. That power does not alter the premise that an injunction is generally the most efficient form of relief. *See* Calabresi and Melamed, *supra*, at 1118; Posner, *supra*, at 62. It merely emphasizes that the Authority through condemnation can effectively transform injunctive relief into a damages award. Arguably, the most efficient result is to enforce the covenant against the Authority and then remit it to its power of condemnation. This result would recognize the continuing validity of the covenant, compensate Davidson for its benefit, and permit the needy citizens of New Brunswick to enjoy convenient shopping.

Forcing the Authority to institute eminent-domain proceedings conceivably would waste judicial resources and impose undue costs on the parties. A more appropriate result is to award damages to Davidson for breach of the covenant. That would be true, I believe, even against a subsequent grantee that does not possess the power to condemn.

Money damages would compensate Davidson for the wrong done by the opening of the George Street supermarket. Davidson would be "given what plaintiffs are given in many types of cases—relief measured, so far as the court reasonably may do so, in damages." *Gilpin, supra,* 47 *N.J.Super.* at 34, 135 *A.*2d 204. The award of money damages, rather than an injunction, might be the more appropriate form of relief for several reasons. First, a damages award is "particularly applicable to a case, such as this, wherein we are dealing with two commercial properties * * *." *Id.* at 35, 135 *A.*2d 204. Second, the award of damages in a single proceeding would provide more efficient justice than an injunction in the present case, with a condemnation suit to follow. Davidson would be compensated for the loss of the covenant and the needy residents would enjoy more convenient shopping. That solution is both efficient and just.

I can appreciate why New Brunswick residents want a supermarket and why the Authority would come to their aid. Supermarkets may be essential for the salvation of inner cities and their residents. The Authority's motives, however noble, should not vitiate Davidson's right to compensation. The fair result, it seems to me, is for the Authority to compensate Davidson in damages for the breach of its otherwise valid and enforceable covenant.

Justice CLIFFORD joins in this opinion.

Justices CLIFFORD and POLLOCK concurring in the result.

For reversal and remandment—Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—6.

For affirmance—None.

OPINION AND JUDGMENT OF
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION,
DECIDED SEPTEMBER 15, 1988

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5489-86T8

DAVIDSON BROS., INC., a New Jersey Corporation,
Plaintiff-Appellant,
v.

D. KATZ & SONS, INC., a New Jersey Corporation; CITY OF NEW BRUNSWICK, a Municipal Corporation; C-TOWN, a Division of Krasdale Foods, Inc., a New York Corporation; and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,
Defendants-Respondents.

ORIGINAL FILED
APPELLATE DIVISION
SEP 15 1988
JACK G. TRUBENBACK
CLERK

Argued March 9, 1988 - Decided Sep 15 1988

Before Judges King, Gruccio and D'Annunzio

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County.

Bruce H. Snyder argued the cause for appellant (Lasser, Hochman, Marcus, Guryan & Kuskin, attorneys).

Arthur L. Phillips, argued the cause for respondent D. Katz & Sons, Inc.

Linda K. Anderson, Assistant City Attorney, argued the cause for respondent City of New Brunswick.

George J. Otlowski, Jr., argued the cause for respondent C-Town.

Robert J. Lecky, argued the cause for respondent New Brunswick Housing Authority.

PER CURIAM

This appeal presents two issues. The first issue is whether a covenant in a deed that the lands and premises conveyed shall not be used as a supermarket or grocery store for forty years is enforceable against the covenantor's grantee. The second issue is whether an alleged rent-free lease of lands and premises by a public entity to a private corporation for use as a supermarket constitutes a gift of public property in violation of the New Jersey Constitution.

On September 8, 1980, plaintiff, Davidson Bros., Inc. (Davidson) and Irisondra Inc. (Irisondra) conveyed, by separate deeds, lands and premises in the City of New Brunswick to defendant, D. Katz & Sons, Inc. (Katz). We shall refer to this property as the George Street tract. Davidson had operated a supermarket on the George Street tract and was also operating a supermarket approximately two miles away on Elizabeth Street. On the theory that neither supermarket could generate a profit while competing with the other, each deed contained the following covenant:

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.

In 1986, Davidson learned through newspaper articles that the New Brunswick Housing Authority (Authority) intended to purchase the George Street tract from Katz and to lease that tract to defendant Krasdale Foods, Inc. (C-Town) for the operation of a supermarket. It is the Authority's opinion that redevelopment of the George Street area requires, among other facilities, an accessible supermarket.

Davidson commenced this action seeking a judgment declaring that the covenant is binding upon defendants "and upon any and all subsequent owners of the premises and enjoining defendants from utilizing the George Street tract in violation of the covenant." In the second count, Davidson sought a judgment enjoining defendant City of New Brunswick and the Housing Authority from leasing the

George Street tract on any basis which would constitute a gift to any private party. Both counts sought compensatory and punitive damages. Summary judgments were entered in favor of all defendants and Davidson now appeals.

During oral argument we noted that the complaint and supporting papers filed on motions for summary judgment did not describe Davidson's interest in the lands and premises on Elizabeth Street other than to allege that Davidson operated a supermarket there. The parties have complied with our request to supplement the record in this regard. It has been established for purposes of this appeal that the Elizabeth Street property is not owned by Davidson or by any related person or entity and that Davidson occupies the Elizabeth Street property as a sub-lessee. Davidson's sub-lease commenced in 1978 for a period of 20 years plus two renewal terms of five years.

The trial court refused to enforce the covenant on the authority of Brewer v. Marshall and Cheeseman, 19 N.J.Eq. 537 (E. & A. 1868). In that case, the Court denied enforcement of a covenant not to sell marl, a clay rich in calcium carbonate, extracted from defendants' lands. The covenant was intended to protect the covenantee, the owner of adjoining marl deposits, from competition.

Davidson contends that Brewer is an archaic decision which does not represent the current law in New Jersey, citing DeGray v. Monmouth Beach Club House Co., 50 N.J.Eq. 329 (Ch. 1892), aff'd o.b. 67 N.J.Eq. 731 (E. & A. 1894); Trenton Potteries Co. v. Oliphant, 58 N.J.Eq. 507 (E. & A. 1899); National Bank at Dover v. Segur, 39 N.J.L. 173 (Sup. Ct. 1877); Renee Cleaners, Inc. v. Good Deal Supermarkets of New Jersey, Inc., 89 N.J. Super. 186 (App. Div. 1965), certif. den. 46 N.J. 216 (1966); Alexander's Department Stores of New Jersey, Inc. v. Arnold Constable Corp., 105 N.J. Super. 27 (Ch. Div. 1969); Furness v. Singuett, 60 N.J. Super. 410 (Ch. Div. 1960).[1]

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[1] Of course, to the extent that these cases involve actions between the original parties to a covenant they are legally distinguishable from cases in which at least one party is a grantee or other successor or assignee of an original party.

There is some merit to Davidson's contention that Brewer no longer has vitality, but we need not address that subsidiary issue. For the purpose of this decision we assume that Brewer is not applicable, that covenants designed to protect the covenantee from competition may run with the land and, therefore, may be enforceable against a covenantor's grantee in appropriate cases. We also assume, without deciding the issues, that Davidson's leasehold is an interest in land sufficient for it to enforce a covenant against the covenantor's grantee and that a distance of two miles between the alleged servient and dominant tenements does not in itself prevent a covenant from running with the land in an appropriate case. We now affirm the trial court's decision that the covenant in this case is unenforceable against Katz' grantees.

Although the Law of Covenants has been described as an "unspeakable quagmire," 5 Powell, Real Property (1987), §670 at 60-11, it is well established that at law or in equity one of the elements for enforcement of a covenant against a third party is that the covenant "touch and concern" the land. Id., §674 at 60-35; 7 Thompson, Real Property (1962), §3152 at 71; Restatement, Property §537 at 3218 (1944); Caulette v. Stanley Stilwell and Sons, Inc., 67 N.J. Super. 111, 116 (App. Div. 1961). To constitute a covenant touching and concerning the land "the promise must exercise direct influence on the occupation, use or enjoyment of the premises. It must be a promise 'respecting the use of the land' that is 'the use of identified land which is not merely casual and which is not merely an incident in the performance of the promise.' 5 Restatement, Property, Scope Note to Part III pp. 3147-48 (1944) ...." Ibid. To run with the land the benefit must enhance or otherwise affect the use or value of the covenantee's retained lands. Id. at 118. "When ... the burden is placed upon the land, and the benefit is personal to one of the parties and does not extend to his or other lands, the burden is generally held not to run with the land at law. The policy is strong against hindering the alienability of one property when no corresponding enhancement accrues to surrounding land. See 5 Restatement, Property supra, §537, pp. 3218; 2 American Law of Property, §9.13, pp. 373-76 (1952)." Ibid. It has been said that if the covenant causes the covenantor's land to lose value and the covenantee's land to become more valuable, then the covenant touches and concerns the land. 5 Powell, Real Property,

§673[2] at 60-41 (1987).

In the present case, the covenant's benefit does not touch or concern the Elizabeth Street lands and premises on which Davidson operates a supermarket. We reject Davidson's implied contention that the Elizabeth Street property, or its leasehold interest therein, is rendered more valuable because a small tract of land two miles away may not be utilized as a supermarket. Our rejection of Davidson's contention is not based on any finding or conclusion by us that a George Street supermarket will not impair the profitability of Davidson's Elizabeth Street market. Such a conclusion would be inappropriate based on this record. To the contrary, for the purposes of this appeal we accept Davidson's allegation that a George Street market would impair the profitability of its Elizabeth Street market. But acceptance of Davidson's allegation requires us to accept the hypothesis that Davidson's market draws its clientele from a market circle with a radius of at least one mile.[2] The area of such a circle is 3.1 miles or approximately 2,000 acres. The George Street property is substantially less than 1/2 an acre. The covenant in question only protects Davidson from use of the George Street property as a supermarket. The covenant does not impair the use of the other 2,000 acres in the market circle as a supermarket. Consequently, any impact of the George Street covenant on the value of the Elizabeth Street lands, or on Davidson's limited interest in those lands, would be speculative, tenuous and, at best, insubstantial.

Alexander's v. Arnold Constable, supra, is not to the contrary. Although covenants in a lease and in a deed designed to protect Arnold Constable from competition were enforced in that case, they were enforced as to lands immediately adjacent to the Arnold Constable shopping center. In dictum the Chancery Judge stated that a covenant in the lease preventing the landlord and its principals from constructing or operating shopping centers within five miles of Arnold Constable was enforceable. The trial judge was discussing the lease covenant's enforceability against parties to the Arnold Constable lease and not against third party assignees of the

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[2] The one-mile radius is one-half the distance between the George Street tract and the Elizabeth Street store. The one-mile radius gives Davidson the benefit of a conservative inference as to the market area.

covenantors. Moreover, as previously indicated, Alexander's did not involve enforcement of covenants as to lands physically remote from the dominant tenement.

To recapitulate, we do not hold that a benefit may not touch and concern land physically remote from the servient tenement.[3] However, in this case, we are satisfied that the benefit does not touch and concern Davidson's Elizabeth Street property. Therefore, applying the principle applicable in New Jersey that both burden and benefit must touch and concern the land before a covenant will run with the land, Caulette v. Stanley Stilwell & Sons, Inc., supra, the covenant in this case does not run with the land but is a personal covenant between Katz and Davidson. Consequently, the covenant is not effective to restrict the use of the George Street property by Katz' grantees.

Davidson also challenges the lease of the George Street property to C-Town for a five-year term at a rental of $1.00 per month. The lease requires C-Town to operate a "full service supermarket" within the demised premises, seven days a week. C-Town also acquired an assignment of the Authority's rights to a parking lot owned by Katz and leased to the Authority. The annual rent of $19,800 for the Katz parking lot is to be paid by C-Town. C-Town also agreed to spend at least $10,000 to improve the front of the building and "ingress and access to the building," to insure the building against liability and casualty loss including extended coverage, to maintain and repair the property and appurtenant equipment and to pay "municipal real estate taxes and any other taxes relating to the property."

The lease also granted C-Town an option to purchase the property, excluding the parking lot leased from Katz, upon expiration of the lease, providing C-Town was in possession of the property and operating a supermarket. The option price is "fair market value" but not less than $450,000, the price to be paid by the Authority to Katz.

Lease of the property by the Authority for supermarket pur-

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[3] Although we have found no case in which the burdened and benefitted properties were so physically remote from each other.

poses was submitted to the public on a bid basis. C-Town was the only bidder.

The rationale of this transaction from the City's and Authority's point of view was expressed in the affidavit of Richard M. Keefe, Executive Director of the Authority:

> I, Richard M. Keefe, Executive Director of the Housing and Urban Development Authority of the City of New Brunswick DO HEREBY ATTEST to the fact that a dire need exists for the establishment of the C-Town Supermarket with the building known as 271 George Street in the New Brunswick Downtown area. Such need is dictated primarily by the following factors:
>
> 1. There is presently no supermarket located in or near New Brunswick's downtown area.
>
> 2. There is no supermarket with reasonable walking distance of residents of said area.
>
> 3. The incomes of the vast majority of the residents of said area fall within the low to moderate income catagories [sic]. Many of such residents reside within multi-family housing units located within two city blocks distance from the 271 George Street property, included among these are 213 residents of the UAW Senior Citizen rent subsidized housing located at 90 Neilson Street, the 60 residents of the Hoffman Pavilion low rent senior citizen housing building located at 75 Neilson Street, the 246 families residing within the New Brunswick, high-rise public housing complex, and the 206 families residing at the government subsidized New Brunswick Apartments project located at 33 Commercial Avenue.
>
> Many of the above cited residents presently rely on use of taxi cabs or public transportation in order to do their food shopping. The cost of such transportation is prohibitive in light of the income of such

residents.

> 4. The establishment of a supermarket at 271 George Street location would definitely be in the public interest since same would eliminate the hardships and inconveniences worked upon the residents of the downtown area due to the lack of adequate food shopping facilities therein.

Additionally, the City submitted the affidavit of Frank R. Nero, the City's Director of the Department of Policy and Economic Development which corroborated Keefe's affidavit. Agnes Scott, President of the New Brunswick Homes Tenants Council, stated in her affidavit that "[s]ince the closing of the Foodtown Supermarket approximately seven (7) years ago, I and my fellow tenants have had great difficulty and inconvenience in purchasing food and other household necessities due to transportation problems. Except for two (2) high priced 'convenience stores, there is no Supermarket within walking distance where several hundred elderly and low-income people can shop...."

It is apparent that the City and the Authority have entered into a short-term arrangement to induce a private company to operate a supermarket on a trial basis. Undoubtedly, C-Town's motive is profit. The governmental objects are to fulfill a need of a disadvantaged, economically vulnerable class of citizens and to complement its urban renewal efforts by providing a facility necessary to the enjoyment of urban life. Consequently, we affirm the judgment substantially for the reasons expressed by Judge Keefe in his written opinion. See Roe v. Kervick, 42 N.J. 191 (1964). Cf. N.J. Housing & Mtg. Fin. Agency v. Moses, 215 N.J. Super. 318 (App. Div. 1987), certif. den. 107 N.J. 638 (1987) (agency had power to condemn lands for shopping center to be privately operated since center is necessary support service for public residential projects).

I hereby certify that the foregoing is a true copy of the original on file in my office.

Jack G. Trumbenback
Clerk of the Appellate Division

OPINION OF TRIAL COURT ON MOTION
FOR SUMMARY JUDGMENT,
DATED JUNE 30, 1987

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

DAVIDSON BROS., INC., a New Jersey Corporation, Plaintiff,	
v.	Docket No. C-3834-86
D. KATZ & SONS, INC., a New Jersey Corporation, et als., Defendants.	

Decided: June 30, 1987

Bruce H. Snyder, Esq., for Plaintiff, Davidson Brothers, Inc. (Messrs. Lasser, Hochman, Marcus, Guryan & Kuskin)

George J. Otlowski, Jr., Esq., for Defendant, C-Town

Arthur L. Phillips, Esq., for Defendant, D. Katz & Sons, Inc.

Robert Lecky, Esq., for Defendant, Housing Authority of the City of New Brunswick

KEEFE, J.S.C.

This action comes before the court on a motion by plaintiffs for summary judgment seeking to enforce a restrictive covenant in a deed. The issues presented are: (1) whether the restrictive covenant contained in plaintiff's deed to its original grantee prohibiting the use of the subject land as a supermarket for a period of 40 years permissibly burdens the land in the hands of the defendant, New Brunswick Housing Authority (Authority), a successor to the original grantee; and (2) if not, whether the Authority, is nonetheless, prohibited by Art VIII, sec. III, paragraphs 2 and 3 of the New Jersey Constitution from offering the subject premises for lease, virtually rent-free, to defendant, C-Town.

The court recognizes that on such a motion all legitimate inferences must be resolved in favor of defendants. Thus, the facts construed most favorably to defendants, and being stipulated as true for purposes of this motion only are as follows: The subject premises, located at 263-271 George Street and 30 Morris Street, New Brunswick, were owned by plaintiff, Davidson Brothers, and by Irisondra, Inc., a related corporation. On September 8, 1980, Davidson Brothers and Irisondra, Inc., (Davidson) sold the subject premises to defendant, D. Katz and Sons ("Katz"). Both the Deed from Davidson and the Deed from Irisondra were duly recorded in Middlesex County Clerk's Office on September 10, 1980. The Deeds contain the following restriction:

> "The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands."

Just prior to the sale plaintiff owned and operated a supermarket at the subject premises and also at a location approximately two miles from the subject premises. Plaintiff presently operates a supermarket at the latter location.

The premises are in a designated Urban Renewal area. The Department of Economic Development for the City of New

Brunswick has attempted, without success, to entice private supermarkets into this area. The Housing Authority, who has been designated pursuant to statute as the Urban Renewal Agency, has determined that there is a public need for a supermarket and that the area residents live under a hardship without one. To alleviate the problem the Authority purchased the subject premises from defendant, Katz on October 23, 1986. The Authority subsequently accepted a bid from defendant, CC-Town, to operate a supermarket at this location. Under the agreement, C-Town is to rent the subject premises from the Authority for one dollar a year for five years and is to operate a supermarket at this location.

Davidson contends that the trading area of its supermarket encompasses that portion of New Brunswick which would also be the trading area of the proposed C-Town. Thus, plaintiff has filed this motion for summary judgment seeking an order: (1) enjoining defendants from utilizing the premises in violation of the terms of the restrictive covenant; (2) declaring said covenant valid and binding upon defendants, and any and all subsequent owners of the premises during the period of the covenant; and (3) enjoining defendants from leasing the premises for less than a fair market rent, or on any other basis which would constitute a gift, donation or appropriation of public land or money to any private party.

Plaintiff cites four New Jersey cases to advance its argument that covenants against competition in commercial settings are valid and enforceable. They are: Trenton Potteries Co. v. Oliphant, 58 N.J. Eq. 507 (E. & A. 1899); Pierson v. Stafford, 88 N.J. Eq. 385, 387 (Ch. 1918); Renee Cleaners, Inc. v. Good Deal Supermarkets of N.J., Inc. 88 N.J. Super. 186, 191-192 (App. Div. 1965); Alexander's Department Stores of N.J., Inc. v. Arnold Constable Corp., 105 N.J. Super. 14, 27 (Ch. Div. 1969). Of the cases cited all but Alexander's are suits concerning anti-competition covenants brought between the original covenantor and the original covenantee. In the instant case the precise question to be answered is whether the restriction burdens the land in the hands of the Authority who is not the original covenantor, but rather a grantee of the covenantor. The Authority concedes that it purchased the property with notice of the restriction but argues that it should not be subject to it because it offends public policy.

The facts of this case require an examination of the doctrine of

equitable servitudes in the context of anti-competition agreements. In Welitoff v. Kohl, 185 N.J.Eq. 181 (E. & A. 1929) Justice White speaking for the court defined an equitable servitude and its purpose.

> "The restriction resulting from a restrictive covenant, ..., is not an estate in land at all, but is a pure creature of equity arising out of contract and (as applied against a subsequent grantee with notice) resting upon the equitable principle, as I understand it, that where an owner of land has purchased it with notice that a predecessor in title, as a part of a consideration which the latter paid for it, covenanted that it should or should not be used in a designated way in order that the use and enjoyment of other land of the party from whom he bought should be thereby benefited, it would be inequitable to permit such owner, while enjoying the fruits of and claiming under the former grant, part of the consideration for which was the benefit promise by the covenant, to destroy such benefit by violating the covenant. The sole purpose of a restriction is to protect the benefit contracted for by the covenant, and it will not be enforced for any other purpose." page 185-186.

The Alexander's case presented a situation which involved both an issue of the enforceability of a personal covenant between landlord and tenant and the question of whether the benefit of a restrictive covenant runs to the tenant of the original covenantee so that it can be enforced by the tenant.

A statement of the facts in Alexander's is necessary to fully appreciate the court's need to address equitable servitudes in the context of the facts in this case. In 1956 Ridge Holding Company conveyed three contiguous parcels of land in West Orange to three separate entities, namely, Essex Green, Inc., Pleasant Acres Company and Prospect Acres, Inc. The three deeds were each dated March 29, 1956 and were consecutively recorded in the Essex County Register's Office on April 30, 1956. Essex Green, Inc. acquired title to a tract consisting of 48.08 acres fronting on the

northwesterly side of Prospect Avenue in West Orange. An adjoining parcel to the north was acquired by Pleasant Acres Company, and an adjacent parcel to the north and west of the Essex Green, Inc. property was acquired by Prospect Acres, Inc. The deeds to the Pleasant Acres Company and Prospect Acres, Inc. tracts each contained a restrictive covenant which read as follows:

> "The party of the second part, in accepting this deed, does for itself, its successors and assigns covenant and agree to and with the party of the first part, its successors and assigns, that no portion of the above described premises, nor any building or structure now or hereafter erected thereon shall be used for a shopping center or for a store or stores. This covenant shall attach to and run with the lands above described and this covenant is expressly made for the benefit of said lands of the party of the first part consisting of 48.08 acres fronting on the northwesterly line of Prospect Avenue, West Orange, New Jersey, and to be conveyed by deed of even date herewith by the party of the first part to Essex Green, Inc., a corporation of New Jersey." (emphasis supplied)

In 1959 Essex Green, Inc. constructed the Essex Green Shopping Plaza on part of the land acquired from Ridge Holding Company. On September 8, 1959, Arnold Constable as tenant, entered into a lease with Essex Green, Inc. as landlord, for a portion of the shopping center premises for use as a department store and/or specialty store.

Paragraph 27 (b) of the lease provided that:

> "Landlord and Sol G. Atlas and William Doelger shall not directly or indirectly construct or own or operate or control or have a controlling interest in any shopping center and further agree not to lease to any of the stores as shown in Paragraph 51 herein within a radius of five (5) miles from the premises during the term of this lease or any extension or renewal thereof."

Paragraph 51 of the lease states that:

> "Provided the Tenant is not in default of the payment of the fixed annual minimum rental, Landlord will not, without the prior written consent of Tenant, lease or permit the occupancy of any portion of the Shopping Center for any store to be used, occupied, operated or managed, directly or indirectly, by the following persons, firms or corporations, or any parent, subsidiary of affiliate thereof; S. Klein of Union Square, New York, N.Y., May's of Fulton Street, Brooklyn, N.Y., Ohrbach's of 34th Street, New York, N.Y., Lane's of 14th Street, New York, N.Y., Alexander's of Fordham Road and Grand Concourse, Bronx, N.Y., E.J. Korvette of New York, N.Y., Master's Inc. of New York, N.Y., Strauss Stores Corp., Modell's Vim or Davega of New York, Inc., or any other discount-house type of retail business. Landlord shall not without Tenant's prior consent lease or permit the occupancy of any portion of the Shopping Center by any competing department or specialty store." (emphasis supplied)

A "short form" of lease including the foregoing restrictions was duly recorded in the Essex County Register's office and constituted constructive notice to Alexander's and Exander.

In 1961 Essex Green, Inc. sold a 40-acre tract upon which the shopping center is constructed to Essex Green Freeway, Inc., which in turn conveyed it to Essex Green Property Plaza Associates ("Associates") the present owner. Essex Green, Inc. retained title to an eight-acre tract north of and immediately adjacent to this tract. Approximately one-half an acre of this parcel was taken by the State for highway purposes.

On October 21, 1965, Essex Green, Inc., Prospect Acres, Inc. and Pleasant Acres Company entered into contract with Exander to convey their contiguous lands to Exander. It is upon this assembled tract that Exander proposed to erect an Alexander's Department Store with parking facilities. On November 30, 1965, Associates and Essex Green, Inc. released the covenant prohibiting the use of

the Prospect Acres, Inc. and Pleasant Acres Company tracts for a shopping center of store. Associates also entered into an agreement with Exander wherein it granted Exander, its successors and assigns a perpetual easement over the parking facilities now in being or to come into being on its shopping center property. Apparently Associates has received a reciprocal easement over the proposed Alexander's parking area and the plan is to integrate the Alexander's store with the Essex Green Shopping Plaza. On May 27, 1966, by a single common deed from Essex Green, Inc., Prospect Acres, Inc. and Pleasant Acres Company, the aforesaid three properties were conveyed to Exander.

The statement of the court upon which plaintiff relies in its brief is:

> "The restrictions in the Arnold Constable lease prohibiting competition by Alexander's are reasonable in area and duration. In commercial settings such as seller and purchases, as distinguished from employer-employee contracts containing territorial restrictions against post-employment competition, restrictions in excess of five miles have been consistently upheld." 105 N.J. Super. at p. 27.

That statement, however, was made i the context of Arnold Constable's claim against its landlord under the terms of the lease.

However, in addressing the issue as between landlord and tenant arising out of the lease terms the court only resolved the dispute concerning the landlord's sale of the 8 acre tract to Exander. Arnold Constable, of course, wanted to prohibit Alexander's from using the property sold to Pleasant Acres and Prospect Acres which were subject to the deed restriction in favor of Essex Green. The questions thus presented were whether the covenant ran with the land to the benefit of the original covenantee's successor (Arnold's present landlord) and if so whether the benefit could be released without the consent of the tenant.

The court found that the deed restriction was intended to benefit the 48 acre site acquired by Essex Green, Inc. and became "appurtenant" to the lands to be benefited. As such "the benefit thereby created passes with the land to all subsequent grantees of the covenantee." (emphasis added) 105 N.J. Super. at 28. It should be

noted that the court was addressing the rights of a successor to the benefit of an anti-competition covenant. The court did not specifically address, although the facts clearly implicate the issue, whether the burden of such a covenant should pass to the successors of the covenantors. It would appear that the court simply assumed that Alexander's would be so bound since it held without any discussion of the point that:

> "[I]t is entitled to an injunction against use of the Prospect Acres, Inc. and Pleasant Acres Company tracts for use by Alexander's since such proposed use would be violative of the restrictive covenants contained in the respective deeds to said parcels of land." 105 N.J. Super. at 31.

In the subject case the question is now clearly placed in focus. A more detailed review of the doctrine of equitable servitudes is required in the context of anti-competition covenants. Do they run with the land simply because the words of the original deed say that they should and simply because the grantees of the covenantor purchased the property with notice of the restrictions?

It is generally agreed in modern real property law that in order for a covenant to run with the land in equity the plaintiff must prove that: 1) the covenant "touches and concerns" the land; 2) the original covenanting parties intended the covenant to run, and 3) the successor to the burdened land had notice of the covenant. In the present case there is prima facie evidence that the second and third elements have been satisfied.

The first element requires further analysis. The touch and concern requirement is usually analyzed from the point of view of both the benefited (dominant) parcel and the burdened (servient) parcel. Generally speaking, if the covenantor's legal interest in land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that it touch and concern land. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenants performance, then the benefit of the covenant satisfies the requirement that the covenant touch and concern land. It is in the latter respect that the Alexander's case was decided. Powell on Real Property, Vol 5, sec. 673.

Covenants as to competition usually suffice to meet, on the burden side, the touch and concern requirement since they restrict the way in which the covenantor might otherwise use the land. However, Professor Powell notes that New Jersey case law expresses a minority view. He states that, in New Jersey, the "touch and concern requirement is satisfied, as to the burden side, if, but only if, the covenant affects the physical use of the land itself. Such a view effectively stifles any possibility of covenants relating to competition,...." (emphasis supplied) Powell on Real Property, Id. at sec. 675 p. 60-104.

The authority relied upon by Powell is the case of Brewer v. Marshall & Cheeseman, 19 N.J. Eq. 537 (E. & A. 1868). The essential facts of that case are as follows: On February 23, 1841 Cheeseman conveyed to Brewer's grantor the lands held by Brewer at the time suit commenced. In the same instrument Cheeseman conveyed another tract of 28 acres of land in which the following covenant was contained: "also, the said George Cheeseman, his heirs or signs, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property." The tract of land described in the foregoing covenant to which the restriction applied was sold by Cheeseman to Marshall, who, notwithstanding the covenant just quoted, claimed that he had the right to sell marl from that property. There was no question that Marshall bought the property with full knowledge of the negative covenant. However, in the litigation Marshall took the position that a covenant of this nature was not of a character to run with the land.

The court quickly came to the conclusion that the, "covenant under consideration neither runs with the land, nor is it, in effect, the grant of an easement." However the difficulty which the court encountered was the question of whether the concept of equitable servitudes should apply to the transaction recognizing the origin of the doctrine in the early English case of Tulk v Moxhay, 2 Phill 774. With respect to those cases dealing with equitable servitudes the court said: "these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land." Id. at 544. It was pointed out by the court that such covenants were traditionally not directed against "the use of the land," but against

"personal use and enjoyment of the building to be erected upon the land." Id. at 544.

The court held that the rules of equity should not be extended to enforce a covenant of this nature which affected the physical use of the land. It said:

> "If we enforce the covenant now under consideration, I do not know on what theory we could refuse to execute any covenant which has for its purpose any conceivable restriction placed upon the free enjoyment of lands. I cannot think it proper to go this length. No case has yet been extreme as this, and I can perceive no good reason, but much inconvenience, in enlarging this fear of this rule in equity." Id. at 546.

Although Brewer is an ancient case it has been cited favorably on several occasions for the proposition that the doctrine of equitable servitudes should not be extended beyond the class of cases in which it had been utilized prior to the Brewer decision. DeGray v. Monmouth Beach Club House Co., 50 N.J. Eq. 329 (Ch. 1892); Peterson v. Beekmere, Incorporated, 117 N.J. Super. 155, 160 (Ch. Div. 1971); Furness v. Sinquett, 60 N.J. Super. 410, 416 (Ch. Div. 1960); Houston Petroleum Co. v. Automotive Products Credit Ass'n, Inc., 9 N.J. 122, 133 (1952).

The New Jersey view as expressed by the Brewer case is also in accord with the Restatement of Property which holds that the benefit of such covenants may run with the land (thereby agreeing with so much of the Alexander's case that so holds) but prohibits the burden from running. The Restatement of Property suggest that the burden is personal to the covenantor and thus does not touch and concern land.

> "For a promise to run with the land of the promisor it is not enough that the performance of the promise operates to benefit either the promisor or the beneficiary of the promise in the use of his land but it must operate to benefit him in the physical use of his land. It must in some way make the use or enjoyment more satisfactory to his physical senses.

> It is not enough that the income from it is increased by virtue of it. Thus a promise that land of the promisor will not be so used as to compete with a business carried on upon the land of the promisee does not so affect the land of the promisor that it can be made to run with it. Though the benefit to the promisee in being free from competition may be clear, the risk of social harm involved in a possible monopoly of the business uses of land in an extended area is sufficient to induce the refusal to extend the 'running of promises' to such cases." Restatement of Property, sec. 537, Comment (f).

The distinguishing factor between the burden not running while the benefit may run is explained by the Restatement in sec. 543 Comment (e).

> "A promise is a promise respecting the use of land in such a sense as to enable the benefit of the promise to run with the land though the performance of the promise affects the use of the land of the beneficiary of the promise in no way other than to decrease the commercial competition in the use of it as in the case of promises not to compete with a business use carried on upon the land. The promise may be, on the part of the promisor, personal only in the sense that it is not a promise respecting the use of any land of the promisor, or it may be a promise that the competing use shall not be carried on upon neighboring premises owned by him. The fact that the promise is personal on the part of the promisor does not prevent the benefit of it from running.

Thus, in the present case New Jersey case law on the subject will not permit the plaintiff to invoke the doctrine of equitable servitude and obtain an injunction against the Authority since the burden of the restrictive covenant does not touch and concern the land but rather is a personal covenant of Katz. To the extent that Alexander's can be read as authority to the contrary, this court respectfully

disagrees and observes that it is not bound by the decision of another trial court. Matter of D.K., 204 N.J. Super. 205, 215 (Ch. Div. 1985); Smith v. Smith, 150 N.J. Super. 194, 197 (Ch. Div. 1977); Mazza v. Insurance Co. of North America, 149 N.J. Super. 60, 62 (Law. Div. 1977); Lackovic v. New England Paper Tube Co., Inc., 127 N.J. Super. 394, 398 (Law. Div. 1974); Wolf v. Home Inc. Co., 100 N.J. Super. 27, 35-36 (Law. Div. 1968), aff'd, 103 N.J. Super. 357 (App. Div. 1968); The May Stores v. Hartz Mt-Free Zone Center, 162 N.J. Super. 130, 136 (Ch. Div. 1978); Ferraro v. Ferro Trucking Co., 72 N.J. Super. 519, 523 (Law. Div. 1962).

There is, thus, ample and uncontradicted appellate authority, confirmed by a recognized authority on the subject, that the enforcement of anti-competition restrictions against successor grantees of the covenantor is contrary to public policy of long standing. That policy is best stated in the words of the Restatement: in sec. 537 Comment (a):

> "There is a social interest in the utilization of land. That social interest is adversely affected by burdens placed on the ownership of land. This is true whether the burden consists of a limitation on the use to which the land can be put or an obligation to pay for benefits received in it use. In the one case, a desirable use may be discouraged; in the other, prospective purchasers having the means to develop the land may be deterred from doing so by reluctance to incur the obligation. Unless a burden has some compensating advantage which prevents it from being on the whole a deterrent to land use and development, the running of the promise by which it was created is not permitted.

As noted earlier both the Restatement and New Jersey case law find no "compensating advantage" other than a personal one to the covenantee arising from an anti-competition agreement so as to justify binding a non-party to the agreement.

Even should our appellate courts alter the course that our decisions have taken concerning the running of the burden of anti-competition covenants, there are other obstacles in the plaintiff's path. In order for a court of equity to enforce a restrictive covenant

a majority of jurisdictions would require that the restriction be "reasonable and consistent with public policy." see Hayes v. Waverly & Passaic Railroad Co., 52 N.J.Eq. 245 (Ch. 1893). One way of inquiring into whether the restriction is reasonable is to ask whether "by reason of changed conditions such benefit has so largely ceased to exist that it would be inequitable to enforce the restriction." Welitoff v. Kohl, supra, at 181. The rationale for this rule was aptly stated by Justice White:

> "Where clearly appears, therefore, that one applying for injunctive enforcement of a restrictive covenant, has, by reason of changed conditions, no equitably substantial benefit to be thereby protected, but that the application is in fact, part of an attempt to levy and collect increase value of the restricted property, the application will be denied, under the rule that one who invokes equity must do equity,..."
>
> "The increase in the value of the restricted property resulting from a removal of the restriction, is something in which the owner of a benefit of property has no interest whatsoever. His sole concern in praying for the enforcement of the restricting as a protection of his benefit, and if for equitable reasons that is denied him and he is relegated to an action at law for a breech of the covenant, his sole concern is the damage done to his contractual rights, namely, to his benefit, by the breech of the covenant." 105 N.J.Eq. at 186-187.

This line of reasoning finds support even by those jurisdictions which would allow anti-competitive covenants to run with the land. Professor Powell has observed that, "generally speaking courts will not enforce covenants which constitute an unreasonable restraint of trade under either state of federal law. Covenants which restrain competition must be reasonable as to duration and territorial extent, and must not unduly interfere with the interest of the public." Powell, supra, sec. 673(3) at p. 60-105 to 106. See also. Restatement on Property, supra, sec. 539, comment (f). Such inquiries are

necessarily fact sensitive and not easily resolved on summary judgment motions. The Authority has not cited any case which would require this court to strike the covenant as unenforceable as a matter of law under this analysis.

The Authority has not cross moved for summary judgment. Therefore, this court has not been asked to decide which of the two analytical approaches is the appropriate one. Suffice it so say that under either approach plaintiff is not entitled to the relief it seeks based on the restrictive covenant.

The court now turns to a discussion of the second issue. Art VIII, sec. III, paragraphs 2 and 3 of the New Jersey Constitution provide that:

> No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation.
>
> ****
>
> No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever.

To ascertain whether government action is violative of these constitutional provisions the Supreme Court of New Jersey in Roe v. Kervick, 42 N.J. 191, 207 (1964), established a two prong test. First, is the activity one which serves to benefit the community as a whole? And second, is the activity directly related to the functions of government?

In Roe, the Supreme Court sustained a statute under which the Legislature, recognizing a public duty to relieve the poor, established a program whereby the government loaned moneys to finance redevelopment projects, privately owned and operated for private profit, which would provide job opportunity in economically distressed areas. Critical to its holding sustaining the validity of a statute the Roe court provided that:

> [The concept of public purpose] cannot be static in its implications. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare.

Roe, 42 N.J. at 207, citing Hoglund v. City of Summit, 28 N.J. 540, 549 (1959) ("each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare," citing Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 292-93, 23 N.E. 2d 665, 667 (Sup. Jud. Ct. 1939)). Of equal import, the Roe court provided that:

> The strictures of Article VIII, which were adopted in 1875, were simply the retreat to a fundamental doctrine of government, i.e., that public money should be raised and used only for public purposes. The article brought the doctrine into the organic law and thus established as basic policy a prohibition against lending the credit of the State directly or indirectly, or loaning, giving or donating its money or property or that of its subdivisions to or for the use of an individual, association or corporation for private purposes.

Does the proposed lease to C-Town serve as a benefit to the community as a whole and is the activity of the Housing Authority directly related to the functions of government? It has already been stated that the Housing Authority has determined that there is a public need for a supermarket and there exists a hardship on the area residents without one. As evidenced by the Certification of the Director of the Department of Policy and Economic Development there are strong public policy considerations which outweigh the private interests of the plaintiff. The explanation for this determination is that private supermarkets have refused to locate in the area

under question as the subject premises is in a designated Urban Renewal area. Thus, the lease to C-Town is beneficial to the community as a whole since it promotes the physical well-being of the area residents as it relates to the accessibility of groceries and other necessary items.

Having satisfied the first prong of the Roe test, the remaining question is whether the activity of the Housing Authority is directly related to the functions of government. "An elementary object of government is to protect and further the health, safety and general welfare of the people." Roe, 42 N.J. at 212. The proposed lease is aimed primarily at fostering a public purpose, namely, the improvement in the quality of community life as achieved through the urban redevelopment which has occurred in this area. See, Berman v. Parker, 348 U.S. 26, 33 (1954); Redfern v. Jersey City, 137 N.J.L. 356, 359 (E. & A. 1948).

If it appears that there is a substantial threat to the accomplishment of the protection of the health, safety and general welfare of the people, a governmental duty arises to apply necessary measures to check it. Roe, 42 N.J. at 212, citing New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E. 2d 153, 105 A.L.R. 905 (Ct. App. 1936). In the present case there is a substantial threat to the accomplishment of the physical, economic and social well-being of the area residents. The preservation and protection of residents of an urban renewal area, which by definition is economically deprived, is looked upon by this court as the performance of a governmental function.

The fact that some private benefit may be derived from the proposed lease, or that a private advantage may incidentally result in C-Town, does not affect the constitutional validity of the transaction. Brody v. City of Millville, 114 N.J. Super. 94, 101, (Law. Div. 1971), aff'd, 120 N.J. Super. 1 (App. Div. 1972), aff'd., 62 N.J. 244 (1973); Whelan v. N.J. Power and Light Co., 45 N.J. 237 (1965), Roe v. Kervick, 42 N.J. 191, 218 (1964). Thus, as long as the proposed lease is used for beneficient public purposes, governmental in nature, the State constitution is not contravened solely because private benefit may be derived therefrom.

Davidson Brothers argues that the consideration for the proposed lease is nominal and therefore constitutes a gift of property and donation of land in violation of our State constitution. In support

of this argument plaintiff cites two New Jersey cases. They are: Scott v. Town of Bloomfield, 94 N.J. Super. 592, 602 (Law Div. 1967), aff'd, 98 N.J. Super. 321 (App. Div. 1967), app. dism., 52 N.J. 473 (1968); East Orange v. Board of Water Com'rs., etc., 79 N.J. Super. 363, 369-373 (App. Div. 1963), aff'd on other grounds, 41 N.J. 6 (1963).

In Scott, the town council adopted a resolution at a public meeting granting a lease to Boys' Club for 99 years at an annual rental of $1.00. The statute under which the town acted is N.J.S.A. 40:60-45.3. The Scott court proceeds to describe its legislative history as follows:

> The 1950 Legislature enacted L.1950, c. 184, whose title reads:
>
> "An act authorizing the leasing of certain real estate by municipalities to incorporated boys' clubs, and supplementing chapter 60 of Title 40 the Revised Statutes."
>
> To be noted is that the title refers only to "boys' clubs." This law was amended five times as follows:
>
> 1. L. 1951, c. 132 (Senate Bill 201), whose statement reads:
>
> "This bill would permit any municipality to lease real estate to Y.M.C.A.'s and Y.M.H.A.'s under the same conditions as previously provided by law with respect to Boys' Clubs of America." (Emphasis added)
>
> 2. L. 1955, c. 130 (Assembly Bill 546). The bill contained no statement. This law added to the list of clubs any council, club, or troop affiliated with the Boy Scouts of America and Girl Scouts of America.
>
> 3. L. 1957, c. 105 (Senate Bill 181). The bill contained no statement. This law added to the list "any local unit of the New Jersey Association for Retarded Children."

4. L. 1965, c. 149 (Assembly Bill 389). The bill contained no statement. This law added "any local Little League" club to the list.

5. L. 1966, c. 253 (Assembly Bill 439). The bill contained no statement. This law added the Pioneer Boys of America, Inc. to the list.

Scott, 94 N.J. Super. at 597-98.

After concluding that N.J.S.A. 40:60-45.3 is a special law, the Scott court indicated that Art IV, sec. VII, par. 8 provides that:

> "No private, special or local law shall be passed unless public notice of the intention to apply therefore, and of the general object thereof, shall have been previously given. Such notice shall be given at such time and in such manner and shall be so evidenced and the evidence thereof shall be so preserved as may be provided by law.

Scott, 94 N.J. Super. at 598.

Finally, the Scott court noted that the Legislature, in aid of this constitutional mandate, has spelled out the notice requirements in N.J.S.A. 1:6-1 et. seq. The pertinent provisions are as follows:

> Whenever, by the constitution, notice of the intention to apply for passage of any bill is required, such notice shall contain a correct statement of the general object of the bill, be signed by at least one of the parties intending to apply for its passage, and be published, except as required by section 1:6-3 of this title, at least one week before the introduction of such bill, and after the first day of January next preceding such introduction, in at least one of the newspapers published in each county in which the bill is, or is likely, to take effect."

Scott, 94 N.J. Super. at 599

Since there was never any publication of notice prior to the enactment of N.J.S.A. 40:60-45.3., the Scott court declared the

statute unconstitutional.

Although the Scott court did mention that on its face the payment of $1.00 a year is a gift, the crux of the opinion was based upon pre-enactment public notification requirements. On appeal our Appellate Division said:

> The trial court's action was based, inter alia, upon the determination that the statutory provision authorizing the lease was a special law that was unconstitutional because the appropriate pre-enactment public notification (R.S. 1:6-1) required by Art. IV, sec. 7, par. 8 of our State Constitution had not been given.

Scott, 98 N.J. Super. at 322. Furthermore, an appeal was taken to our Supreme Court but, before argument, the lease was cancelled by mutual consent of the interested parties. Scott, 52 N.J. at 474. Therefore, plaintiff's reliance on Scott as authority for the proposition that the proposed lease to C-Town constitutes a gift, is misplaced.

It should be pointed out that in our case the Secretary and Executive Director of the Housing Authority certified that: (1) the Board of Commissioners did, by Resolution, establish a method for leasing the subject premises; (2) the Authority had the "Public Notice of Invitation for Proposals" published in a local newspaper; (3) interested parties were to obtain a copy of the lease and Bid Proposal at the Authority's offices, (4) proposals were made at public auction; (5) C-Town was the only party to submit a proposal at the auction; (6) C-Town agreed to make $10,000.00 in improvements to the exterior of the building and improvements for ingress and egress; (7) a $5,000.00 check was delivered as security for performance, which was ultimately returned; and (8) C-Town entered into a lease for the subject premises.

In addition of Scott, plaintiff relies on East Orange v. Bd. of Water Comm'rs., etc., 79 N.J. Super. 363, 369-73 (App. Div. 1963), aff'd on other grounds, 41 N.J. 6 (1963), for the same proposition. In East Orange, the City entered into a lease with a golf club whereby they rented approximately 151 acres of land for $1.00 per year. The principal allegation was that the consideration paid for the lease was nominal and therefore constituted a gift of property in

violation of our State constitution. The underlying purpose of the East Orange lease was as follows:

> Whereas, a large group of citizens of the City of East Orange have formed an association for the purpose of encouraging golf and other athletic and recreational activities among the citizens of the City, and have made application to the City for a lease of a portion of the lands now used by the City as a water shed, for the purpose of constructing two or more golf courses and other athletic facilities, and
>
> Whereas, the City Council desires to encourage such athletic activities on the part of its citizens and feels it is to the interest of the City to make such lease with the East Orange Golf Association.

East Orange, N.J. Super. at 368.

The East Orange court held that "on its face, this appears to be a gift, contrary to N.J. Const., Art VIII, sec. III, pars. 2 and 3." East Orange, 79 N.J. Super. at 369, citing Jamourneau v. Local Government Board, 6 N.J. 2281 (1951). It is important to note that the East Orange decision in the Appellate Division was rendered prior to the Roe decision. Today the correct analysis in the East Orange case would be whether the activity of the City is one which serves as a benefit to the community as a whole, and is directly related to the function of government.

The point is that it is not essential that the consideration meet the test of adequate consideration in the strict contract sense. For example, in Hill v. Summit, 64 N.J. Super. 522, 530-31 (Law Div. 1960), the court said:

> It has been stipulated that the City of Summit conveyed the premises in question for $10.00 although the appraised value was $9,000.00. It is conceded that the monetary consideration was inadequate, but the basic test is whether the municipal action under attack may be characterized as a public one. Hoglund v. City of Summit, Supra. The fulfillment of a public purpose is adequate consideration to sustain a state donation or appro-

priation and it is not essential that the consideration meet the test of adequate consideration in the strict contract sense.

See also, Roe 42 N.J. at 222.

Plaintiff argues that is is unclear whether the Authority is attempting to bring the lease within the terms of N.J.S.A. 55:14A-41 which provides in full:

> 55:14A-41. Availability of land for use by private enterprise or public agencies; conditions imposed on sale or lease.
>
> The authority may make land in a redevelopment project available for use by private enterprise or public agencies in accordance with the redevelopment plan. Such land may be made available at its use value, which represents the value (whether expressed in terms of rental or capital price) at which the authority determines such land should be made available in order that it may be developed or redeveloped for the purposes specified in such plan.
>
> To assure that land acquired in a redevelopment project is used in accordance with the redevelopment plan, an authority, upon the sale or lease of such land, shall obligate purchasers or lessees: (1) to use the land for the purpose designated in the redevelopment plan; (2) to begin the building of their improvements within a period of time which the authority fixes as reasonable; (3) to comply with such other conditions as are necessary to carry out the purpose of this act; and (4) if as a part of the redevelopment project or in connection therewith any property owned or used by a public utility (as defined in section 48:2-13 of the Revised Statutes) in furnishing any commodity or service which it is authorized by law to furnish, shall be removed, reconstructed, altered or relocated, to pay the cost

and expense of the removal, reconstruction, alteration or relocation of such property, including the cost of installing or replacing such property in a new location or new locations, and the cost of any lands or any rights or interests in lands, and any other rights acquired to accomplish such removal, reconstruction, alteration or relocation of such property, less the cost of any lands or any rights or interests in lands or any other rights of the public utility paid to the public utility in connection with removal, reconstruction, alteration or relocation of such property, which cost and expense shall be included in the cost of the redevelopment project. Any such obligations by the purchaser shall be covenants and conditions running with the land where the authority so stipulates.

In the event that as part of the redevelopment project the authority has agreed to pay for any or all items of expense described in section 9 (C. 55:14A-39) hereof and has included the same in the cost of the redevelopment project, then the authority and the purchases or lessee of the land, shall not be obligated to include the cost of such work in any agreement for the sale or lease of the land, nor shall the purchases or lessee be obligated to pay for same. The provisions of (4) of this section 11 (C. 55:14-41) shall, however, be applicable with respect to all items of public utilities relocation expense described in section 9 (C. 55:14A-39) and in (4) of this section (C. 55:14A-41) the responsibility for which the authority has not undertaken as part of the redevelopment project and has not assumed in any agreement with the purchases or lessee.

Amended by L. 1969, c. 209, sec. 1, eff. Dec. 2, 1969.

Plaintiff contends that the statute cannot be construed to autho-

rize a transaction prohibited by our State constitution. However, since this court has determined that the action by the Authority is not violative of our State constitution, plaintiff's contention must fail.

The, the proposed lease satisfied the requirements of public purpose under the Roe decision, and the Authority is not prohibited by Art VIII, sec. III, pars. 2 and 3 of our State Constitution from consumating the transaction.

Plaintiffs' motion is denied.

No. 94-1381

Supreme Court, U.S.
FILED
MAR 14 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

DAVIDSON BROS., INC., a New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation, CITY OF NEW BRUNSWICK, a Municipal Corporation, C-TOWN, a Division of Krasdale Foods, Inc., and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENTS D. KATZ & SONS, INC., A NEW JERSEY CORPORATION, CITY OF NEW BRUNSWICK AND NEW BRUNSWICK HOUSING AUTHORITY

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STATEMENT OF JURISDICTION

The decision of the Superior Court of New Jersey, Appellate Division, was rendered on June 23, 1994. The Supreme Court of New Jersey denied the Petitioner's Petition for Certification on November 16, 1994. The Petitioner has cited 28 U.S.C. § 1257 as the grounds on which the jurisdiction of this Court is invoked. The Respondents submit that none of the bases set forth in 28 U.S.C. § 1257 for certiorari review of a judgment rendered by the highest court of a state are present in this case. The final judgment of the Supreme Court of New Jersey raises no federal issue.

STATEMENT OF THE CASE

As the Supreme Court of New Jersey noted in its 1990 decision in this case, the basic underlying facts concerning the transactions among the parties are not in dispute. *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 579 A.2d 288, 289 (1990) (Pet. App. 35a). The court summarized these facts in its opinion. 579 A.2d at 289-90 (Pet. App. 35a-36a). To the extent that the Petitioner has set forth these undisputed facts, the Respondents agree with such statements and incorporate them here by reference.

The Petitioner's Statement of the Case also contains many argumentative statements, set forth at great length, which are improper in light of Supreme Court Rule 14.1(g). That Rule requires a concise statement of material facts. The Respondents expressly disagree with, and do not incorporate here, those parts of the Petitioner's Statement of the Case which constitute argument rather than a concise summary of the facts.

In addition to the evidence described in an argumentative fashion in the Petitioner's Statement of the Case, the Respondents offered at trial the testimony of a number of

witnesses who testified in detail concerning the need for a supermarket in the community immediately surrounding the George Street location, the injurious effects of the Petitioner's closure of its store at that location and of the 40-year restrictive covenant on that property, and the inability of the City of New Brunswick to secure another location for a supermarket in the same area.

Such evidence included testimony from: Richard Keefe, former Executive Director of the New Brunswick Housing Authority; John Lynch, former Mayor of New Brunswick; Andre Byrom, Beatrice Harris, Mary Hush and the Reverend Oren Hardgrove, residents and/or community leaders in the area around the George Street property; Glenn Patterson, Director of Policy and Development for the City of New Brunswick, and Dr. James O'Connor, an expert in food marketing. Davidson Bros. presented no witnesses on the issues of public need for a supermarket at the George Street site and/or the restrictive covenant's interference with the public interest in meeting that need.

Contrary to an assertion in the Petitioner's Statement of the Case (Petition for Writ of Certiorari 15), the Superior Court, Appellate Division decision in this case mentioned and took into account the eight factors which the Supreme Court of New Jersey had set forth for determining the reasonableness of the restrictive covenant under state law (Pet. App. 5a).

A statement in the Petitioner's Statement of the Case suggests inaccurately that the Appellate Division approved of "the taking of the covenant without compensation" (Petition for Writ of Certiorari 16). In fact, as the Petitioner has stated on the preceding page (p. 15) of the Petition for Writ of Certiorari, the Appellate Division made no mention of a takings issue, because that issue was not before it.

SUMMARY OF THE ARGUMENT

There are no special and important reasons for granting the Petition for Writ of Certiorari in this case. The decisions by the state courts, including the Supreme Court of New Jersey, rest exclusively on a nonfederal ground, the invalidity of the restrictive covenant under the reasonableness test adopted in New Jersey (Pet. App. 44a-46a).

The Petitioner also failed to raise a federal issue in a timely and proper fashion. No federal issue was pleaded in Petitioner's original Complaint, nor did it amend or even seek leave to amend that Complaint to include a federal question.

The decision by the Supreme Court of New Jersey is not in conflict with decisions of the Supreme Court of the United States, a United States court of appeals or another state court of last resort.

The Petitioner has not suffered the taking of property without compensation in violation of a federal constitutional right. Since the restrictive covenant is invalid and unenforceable under state law, it is not a property right, the loss of which must be compensated. In addition, invalidation of the restrictive covenant does not cause a compensable taking because such a result is proportional to the injurious effects of the covenant on public interests.

REASON FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISIONS OF THE NEW JERSEY COURTS INVOLVE NO FEDERAL ISSUE AND ARE NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT, A FEDERAL COURT OF APPEALS, OR A STATE COURT OF LAST RESORT.

The Supreme Court will grant a petition for writ of certiorari only when there are "special and important reasons" for doing so. Sup. Ct. R. 10.1. Respondents respectfully submit that there are no such reasons in this case.

In the circumstances presented here, where the highest court of a state has denied certification of an appeal without stating any ground for its decision, the Supreme Court must ascertain whether that court's decision might have rested on a non-federal ground, "for if it did we must decline to take jurisdiction." *Ellis v. Dixon*, 349 U.S. 458, 459 (1955) (citing *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952)). In this case, the Court should decline to take jurisdiction, because the *only* grounds properly raised before, and decided on by, the state courts were non-federal grounds.

A principal purpose for this Court's exercise of its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). This consideration is embodied in Supreme Court Rule 10.1(b), which, in pertinent part, refers to cases in which a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Rule 10.1(b) does not apply to this case. The Supreme Court of New Jersey did not decide a federal

question at all (Pet. App. 1a, 32a). Nor, for that matter, did the Appellate Division or the Law Division of the Superior Court of New Jersey decide a federal question (Pet. App. 2a, 15a). Each of these state courts had before them, and rendered decisions on, only the state law issues concerning whether the restrictive covenant at issue in this case was contrary to the public interest, unreasonable, and hence, unenforceable.

The federal issue asserted by Petitioner is the takings issue. Although the Petitioner commenced this action with a Complaint filed in June of 1986, no takings issue was pleaded in the original Complaint (Res. App. 1a-8a) or the Amended Complaint (Res. App. 9a-14a), nor did Petitioner ever amend or seek leave to amend that Complaint to include a takings question or any federal question. The Petition indicates that the Petitioner obliquely referred to the takings question for the first time seven years later, in a trial brief and at oral argument at the trial following remand in January 1993. In fact, the takings argument was used by Petitioner only after Justice Pollock's concurrence in the New Jersey Supreme Court decision. At that point, the case had already been appealed through the state courts to the Supreme Court of New Jersey, which remanded the case to the trial court for determination of the reasonableness of the restrictive covenant. Four of the six participating justices did not endorse Justice Pollock's position.

Moreover, the Petitioner did not raise the takings issue in its Plaintiff-Appellant's Brief filed with the Appellate Division after the 1993 trial. Where a federal constitutional question was not properly raised in state court proceedings, the question is not open for a decision by the Court in a proceeding on a petition for certiorari. *Ellis v. Dixon, supra,* 349 U.S. at 460.

Even assuming there was a state court decision on a question of federal law, Rule 10.1(b) still does not apply because there is

no conflict between the state courts' decisions in this case and a decision of another state court of last resort or of a United States court of appeals. The decisions cited by the Petitioner are either not on point with the facts of this case or were decided on the basis of questions of state law concerning the validity and enforceability of restrictive covenants, not the federal taking issue which the Petitioner wishes this Court to consider (Petition for Writ of Certiorari 22-23).

There are other decisions, not cited by the Petitioner, in which courts have invalidated restrictive covenants because of injury to public interests which were closely akin to the public interests which were present in this case. Courts have not allowed restrictive covenants to thwart the substantial public interests in favor of insuring adequate public roads, *see Anderson v. Lynch,* 188 Ga. 154, 3 S.E. 2d 85 (1939), or those in favor of providing the basic necessities of life to another group of disadvantaged citizens, the mentally or developmentally disabled. *See Westwood Homeowners Association v. Tenhoff,* 155 Ariz. 229, 745 P.2d 976 (1989); *Craig v. Bossenbery,* 134 Mich. App. 543, 351 N.W. 2d 596 (1984); *Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear,* 877 S.W. 2d 550 (Tex. Ct. App. 1994) (restrictive covenants preventing use of property in residential area as a home for the mentally retarded held invalid because of public policy to promote the public welfare of mentally retarded citizens and to provide services to them in their own communities).

The restrictive covenant in this controversy was found to be invalid and unenforceable because it was unreasonable in its duration, restrained trade and adversely impacted upon public interest and public need (Pet. App. 30a). The trial judge further determined that there was insufficient evidence in the record on remand to establish changed circumstances in the neighborhood from the date the covenant was imposed (Pet. App. 30a), thereby

indicating that the covenant was invalid from its inception. Thus, the involvement of a branch of government in this controversy can not convert the matter to a "taking," for the covenant would have been unenforceable against any successor-in-interest to D. Katz & Sons, Inc.

Since this case involves no decision by a state court on a question of federal law, Rule 10.1(c), the only other possibly applicable part of Rule 10.1, also does not apply. Rule 10.1(c) refers in pertinent part to a state court decision on "an important question of federal law which has not been, but should be, settled by this Court, or to such a decision, on a federal question, which "conflicts with applicable decisions of this Court." In any event, the federal question posed in the Petition for Writ of Certiorari is not an important and unsettling one requiring a decision by this Court, nor would resolution of that question in the Respondents' favor conflict with precedents of this Court.

The New Jersey Superior Court, Appellate Division, whose decision was left undisturbed by the Supreme Court of New Jersey, properly held on the basis of the facts before it, and the law established by the Supreme Court of New Jersey in this very case, that the restrictive covenant was unreasonable and unenforceable under state law (Pet. App. 2a). Accordingly, under state law, the Petitioner has no property interest in the covenant, the loss of which could give rise to an argument based on a taking without compensation. In describing the federal district court case on which it relies most heavily, the Petitioner has referred to that court's observation that the meaning of "property" as used in the Fifth Amendment normally is derived from local or state law (Petition for Writ of Certiorari 18). *See United States v. Certain Lands in City of Augusta,* 220 F. Supp. 696, 699 (D. Me. 1963) (*citing, United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 279 (1943); *United States v. Causby,* 328 U.S. 256, 266 (1946)). Where, as here, there is no enforceable

property right under state law, there can be no compensable taking. The several federal court cases relied on by the Petitioner (Petition for Writ of Certiorari 18-20) are distinguishable from this case in that they involved restrictive covenants, the validity of which under state law had not even been questioned, much less decided in the negative by a state's highest court.

Even assuming only for argument's sake that the restrictive covenant is a valid, enforceable property interest under state law, the loss of which could support a takings argument, the decisions by the state courts in this case are not in conflict with this Court's precedents in this area of the law. The principles of law from the court's most recent takings case, *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), when applied to this case, show that no taking has occurred. In *Dolan,* the Court ruled that a restriction on land use (in that case, a requirement that land be dedicated for public use as a condition for a permit) must satisfy two requirements to withstand scrutiny under a takings analysis. First, there must be an "essential nexus" between a legitimate state interest and the restriction imposed by the state. *Id.* at 2317. If such a nexus exists, there must be "rough proportionality" between the nature and extent of the restriction and the impact of the land-owner's use of his property.

As the Appellate Division observed at some length (Pet. App. 6a-14a), the evidence in this case showed a close connection between invalidation of the restrictive covenant and advancing the clearly legitimate state interest in redevelopment and revitalization of the affected area in which the property is situated. Moreover, the invalidation of the restrictive covenant is commensurate with the adverse impacts on the surrounding community, which would be certain to occur if the covenant was to be given effect. More than mere "rough proportionality," there is a very close fit between the injurious effects of the restrictive covenant on the public interest and the remedy which has been tailored to avoid those effects.

The Petitioner has mischaracterized the decisions in this case by the courts of New Jersey as following a rule which would invalidate any restrictive covenant that in some way interferes with a governmental function (Petition for Writ of Certiorari 20). On the contrary, this case is about a restrictive covenant which was properly held invalid under state law because it was contrary to the public interest of providing basic necessities of life to residents of a community in imminent danger of losing them. This decision was reached only after an extensive trial, and after careful application of the eight-part reasonableness test articulated by the Supreme Court of New Jersey when this case first came before that court (Pet. App. 45a-46a). The New Jersey Superior Court, Appellate Division, expressly referred to this reasonableness test, giving appropriate emphasis to factor seven, concerning a covenant's adverse impact on the public interest (Pet. App. 6a, 13a-14a). Most of the evidence at trial related to, and had shown the existence of, such injury to the public interest (Pet. App. 23a-27a, 30a). The Petitioner presented no evidence to refute the showing that the restrictive covenant severely interfered with the public interest in providing a means by which low-income and elderly residents of the area in question could obtain basic necessities.

The ruling by the trial court and the Appellate Division certainly does not mean, as Davidson Bros. contends, that restrictive covenants against competition will become meaningless and unenforceable in virtually every case. Rather, the lower court decisions in this case were governed very much by the particular facts of this case. Only in those New Jersey cases where the facts similarly show covenants which fail the reasonableness test will the covenants be vulnerable to a judicial finding that they are invalid and unenforceable under state law.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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APPENDIX A — VERIFIED COMPLAINT FILED JUNE 16, 1986

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-3734-86

Civil Action

DAVIDSON BROS. INC., a New Jersey Corporation,

Plaintiff,

-vs-

D. KATZ & SONS INC., a New Jersey Corporation; CITY OF NEW BRUNSWICK, a Municipal Corporation; and C-TOWN, A Division of Krasdale Foods, Inc., a New York Corporation,

Defendants.

VERIFIED COMPLAINT

DAVIDSON BROS. INC., a New Jersey Corporation, having a place of business at 850 U.S. Highway #1, North Brunswick, New Jersey, by way of Complaint against defendants, says:

Appendix A

FIRST COUNT

1. Plaintiff, Davidson Bros. Inc., presently operates a Foodtown supermarket at 20 Elizabeth Street, New Brunswick, New Jersey.

2. Prior to on or about September 8, 1980, plaintiff and Irisondra, Inc., ("Irisondra"), a related New Jersey corporation, owned certain premises located at 263-271 George Street, New Brunswick, New Jersey, and 30 Morris Street, New Brunswick, New Jersey, known as Lots 9.1, 10, 13, 14, 15 and 17.02 in Block 120, and Lots 16 & 17 in Block 120, respectively, on the Tax Map of the City of New Brunswick.

3. On or about September 8, 1980, plaintiff and Irisondra conveyed title to the premises at 263-271 George Street and 30 Morris Street to defendant D. Katz & Sons ("Katz"), a New Jersey Corporation, by Bargain & Sale Deeds, which deeds were recorded in the Middlesex County Clerk's Office, at Book 3157, Page 811 & Book 3157, Page 817, on September 10, 1980. True copies of said Deeds are annexed hereto as Exhibits A & B respectively and made a part hereof.

4. The Contracts of Sale between plaintiff and Katz, and between Irisondra and Katz, as well as the Deed from plaintiff to Katz and the Deed from Irisondra to Katz, contain the following restriction:

> "V. Lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however

designated, for a period for forty (40) years from the date of this Deed. This restriction shall be a convenant attached to and running with the lands."

5. Said restriction was intended by all of the parties to inure to the benefit of plaintiff.

6. On or about March 11, 1986, defendant City of New Brunswick announced its intention to purchase the premises at 263-271 George Street and 30 Morris Street and to lease said premises to defendant C-Town for a period of five (5) years, rent free, for use as a food market, including meat and produce, delicatessen, housewares and health & beauty departments, and a full line of groceries. A true copy of a newspaper report, dated March 12, 1986, is annexed hereto as Exhibit C and made a part hereof.

7. On or about March 11 and March 12, 1986, plaintiff, through its attorneys, advised defendants, D. Katz & Sons, Inc., City of New Brunswick and C-Town that the proposed transaction, pursuant to which the premises would be utilized as a food market, constituted a violation of the restrictive covenant contained in the deeds to said premises. True copies of such letters are annexed hereto as Exhibits D, E & F respectively and made a part hereof.

8. The supermarket currently owned and operated by plaintiff is located at the intersection of Livingston Avenue and Elizabeth Street, New Brunswick, New Jersey, and is approximately two miles away from the subject premises. The trading area of plaintiff's supermarket encompasses that portion of New Brunswick which would also be the trading area of the proposed C-Town.

9. The proposed use of the subject premises for a C-Town, in direct competition with plaintiff's present supermarket would result in an irreparable and permanent injury to plaintiff's business which could not be measured or compensated in money damages.

10. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants:

A. Preliminarily and permanently restraining and enjoining defendants from in any manner utilizing the subject premises in violation of the terms of the restrictive convenant contained in the deeds from plaintiff and Irisondra to defendant, D. Katz & Sons, Inc.;

B. Declaring said restrictive covenant to be valid and binding upon defendants and upon any and all subsequent owners of the premises during the period of the restrictive covenant;

C. For compensatory and punitive damages;

D. For interest and costs of suit;

E. For such other relief as the Court deems just and proper.

SECOND COUNT

1. Plaintiff repeats and realleges each and every allegation contained in the First Count as if set forth at length herein.

2. Defendants, on information and belief, propose to lease

the subject premises to defendant C-Town, rent-free, for five years in order to give C-Town a competitive advantage relative to plaintiff and other supermarkets in the area.

3. The proposed lease of said premises, rent-free, to C-Town constitutes the giving of money or property to or in aid of a private corporation, and a donation of land or appropriation of money by a municipal corporation to or for the use of a private corporation, contrary to the provisions of Article 8, Section 3, Paragraphs 2 and 3 of the New Jersey Constitution.

4. Said illegal gift to defendant C-Town will result in irreparable and permanent injury to plaintiff's existing business, which injury could not be measured or compensated in money damages.

5. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant City of New Brunswick:

A. Preliminarily and permanently restraining and enjoining defendant City of New Brunswick from leasing, or attempting to lease, the subject premises to any entity for less than fair market rent, or on any other basis which would constitute a gift, donation or appropriation of land or money to any private party.

B. For compensatory damages;

C. For punitive damages;

D. For interests and costs of suit;

E. For such other relief as the Court deems just and proper.

LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
Attorneys for Plaintiffs

BY: s/ Bruce H. Snyder
BRUCE H. SNYDER

DATED: June 16, 1986

Appendix A

STATE OF NEW JERSEY :
: SS VERIFICATION
COUNTY OF ESSEX :

WILLIAM C. DAVIDSON, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am the Vice President of Davidson Bros. Inc., plaintiff in the within matter, and am personally familiar with the facts set forth herein, and with the books and records of Davidson Bros. Inc. and Irisondra, Inc.

2. I have read the Complaint and the allegations contained therein are true to my personal knowledge, except where information and belief are indicated, and, as to those allegations, I believe them to be true.

s/ William C. Davidson
WILLIAM C. DAVIDSON

Sworn to and Subscribed
before me this 16th
day of June, 1986

s/ Doris L. Ames

DORIS L. AMES
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 9, 1987

Appendix A

CERTIFICATION

I certify that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated. I am not aware of any other party who should be joined in this action.

s/ Bruce H. Snyder
BRUCE H. SNYDER

DATED: June 16, 1986

APPENDIX B — AMENDED COMPLAINT FILED FEBRUARY 9, 1987

LASSER, HOCHMAN, MARCUS, GURYAN AND KUSKIN
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Roseland, New Jersey 07068
(201) 226-2700
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-3734-86

Civil Action

DAVIDSON BROS. INC., a New Jersey Corporation,

Plaintiff,

-vs-

D. KATZ & SONS INC., a New Jersey Corporation; CITY OF NEW BRUNSWICK, a Municipal Corporation; C-TOWN, A Division of Krasdale Foods, Inc., a New York Corporation, and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Defendants.

AMENDED COMPLAINT

DAVIDSON BROS. INC., a New Jersey Corporation, having a place of business at 850 U.S. Highway #1, North Brunswick, New Jersey, by way of Complaint against defendants, says:

Appendix B

FIRST COUNT

1. Plaintiff, Davidson Bros. Inc., presently operates a Foodtown supermarket at 20 Elizabeth Street, New Brunswick, New Jersey.

2. Prior to on or about September 8, 1980, plaintiff and Irisondra, Inc., ("Irisondra"), a related New Jersey corporation, owned certain premises located at 263-271 George Street, New Brunswick, New Jersey, and 30 Morris Street, New Brunswick, New Jersey, known as Lots 9.1, 10, 13, 14, 15 and 17.02 in Block 120, and Lots 16 & 17 in Block 120, respectively, on the Tax Map of the City of New Brunswick.

3. On or about September 8, 1980, plaintiff and Irisondra conveyed title to the premises at 263-271 George Street and 30 Morris Street to defendant D. Katz & Sons ("Katz"), a New Jersey Corporation, by Bargain & Sale Deeds, which deeds were recorded in the Middlesex County Clerk's Office, at Book 3157, Page 811 & Book 3157, Page 817, on September 10, 1980. True copies of said Deeds are annexed hereto as Exhibits A & B respectively and made a part hereof.

4. The Contracts of Sale between plaintiff and Katz, and between Irisondra and Katz, as well as the Deed from plaintiff to Katz and the Deed from Irisondra to Katz, contain the following restriction:

> "V. Lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however

designated, for a period for forty (40) years from the date of this Deed. This restriction shall be a covenant attached to and running with the lands."

5. Said restriction was intended by all of the parties to inure to the benefit of plaintiff.

6. On or about March 11, 1986, defendant City of New Brunswick announced its intention to purchase the premises at 263-271 George Street and 30 Morris Street and to lease said premises to defendant C-Town for a period of five (5) years, rent free, for use as a food market, including meat and produce, delicatessen, housewares and health & beauty departments, and a full line of groceries. A true copy of a newspaper report, dated March 12, 1986, is annexed hereto as Exhibit C and made a part hereof.

7. On or about March 11 and March 12, 1986, plaintiff, through its attorneys, advised defendants, D. Katz & Sons, Inc., City of New Brunswick and C-Town that the proposed transaction, pursuant to which the premises would be utilized as a food market, constituted a violation of the restrictive covenant contained in the deeds to said premises. True copies of such letters are annexed hereto as Exhibits D, E & F respectively and made a part hereof.

8. On information and belief, the entity which in fact intends to take title to the subject premises, and to enter into the lease with defendant C-Town, is defendant New Brunswick Housing Authority, a body corporate and politic created pursuant to N.J.S.A. 55:14A-1 *et seq.*, and authorized to carry out redevelopment projects, by the City of New Brunswick, pursuant to N.J.S.A. 55:14A-34.

Appendix B

9. The supermarket currently owned and operated by plaintiff is located at the intersection of Livingston Avenue and Elizabeth Street, New Brunswick, New Jersey, and is approximately two miles away from the subject premises. The trading area of plaintiff's supermarket encompasses that portion of New Brunswick which would also be the trading area of the proposed C-Town.

10. The proposed use of the subject premises for a C-Town, in direct competition with plaintiff's present supermarket would result in an irreparable and permanent injury to plaintiff's business which could not be measured or compensated in money damages.

10. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants:

A. Preliminarily and permanently restraining and enjoining defendants from in any manner utilizing the subject premises in violation of the terms of the restrictive convenant contained in the deeds from plaintiff and Irisondra to defendant, D. Katz & Sons, Inc.;

B. Declaring said restrictive covenant to be valid and binding upon defendants and upon any and all subsequent owners of the premises during the period of the restrictive convenant;

C. For compensatory and punitive damages;

D. For interest and costs of suit;

Appendix B

E. For such other relief as the Court deems just and proper.

SECOND COUNT

1. Plaintiff repeats and realleges each and every allegation contained in the First Count as if set forth at length herein.

2. Defendants, on information and belief, propose to lease the subject premises to defendant C-Town, rent-free, for five years in order to give C-Town a competitive advantage relative to plaintiff and other supermarkets in the area.

3. The proposed lease of said premises, rent-free, to C-Town constitutes the giving of money or property to or in aid of a private corporation, and a donation of land or appropriation of money by a municipal corporation to or for the use of a private corporation, contrary to the provisions of Article 8, Section 3, Paragraphs 2 and 3 of the New Jersey Constitution.

4. Said illegal gift to defendant C-Town will result in irreparable and permanent injury to plaintiff's existing business, which injury could not be measured or compensated in money damages.

5. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant City of New Brunswick:

A. Preliminarily and permanently restraining and enjoining defendant City of New Brunswick and defendant New Brunswick Housing Authority from leasing, or attempting to lease, the subject premises to any entity for less than fair market rent, or on

any other basis which would constitute a gift, donation or appropriation of land or money to any private party.

B. For compensatory damages;

C. For punitive damages;

D. For interests and costs of suit;

E. For such other relief as the Court deems just and proper.

LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
Attorneys for Plaintiffs
BY: s/ Bruce H. Snyder
BRUCE H. SNYDER

DATED: January 15, 1987

No. 94-1381

Supreme Court, U.S.
MAR 14 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

DAVIDSON BROS., INC., a New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation, CITY OF NEW BRUNSWICK, a Municipal Corporation, C-TOWN, a Division of Krasdale Foods, Inc., and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT C-TOWN, A DIVISION OF KRASDALE FOODS, INC.

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a claim by Petitioner premised upon an alleged violation of the United States Constitution when that claim was not presented in the state court.

2. Whether the violation of an equitable servitude which is illegal, void and unenforceable constitutes an impermissible taking of a property interest in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether the violation of an equitable servitude by a private, non-government entity is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Respondent, C-Town, a Division of Krasdale Foods, Inc. is satisfied with the "List of Parties" set forth in the Petition for Writ of Certiorari and adopts same by reference hereto, as if set forth at length.

RULE 28.1 LISTING

Respondent, C-Town, is a Division of Krasdale Foods, Inc., a New York Corporation.

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No. 94-1381

In The

Supreme Court of the United States

October Term, 1994

DAVIDSON BROS., INC., A New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., A NEW JERSEY CORPORATION, CITY OF NEW BRUNSWICK, A MUNICIPAL CORPORATION; C-TOWN, A DIVISION OF KRASDALE FOODS, INC., AND NEW BRUNSWICK HOUSING AUTHORITY, A BODY CORPORATE AND POLITIC,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT C-TOWN, A DIVISION OF KRASDALE FOODS, INC.

OPINIONS BELOW

With one exception, Respondent, C-Town, a division of Krasdale Foods, Inc., is satisfied with the statement of the

"Opinions Below" set forth in the Petition for Writ of Certiorari and adopts same by reference hereto as is set forth at length.

This Respondent would add to the "Opinions Below" as set forth in the Petition for Writ of Certiorari, the following:

> On November 16, 1994, the New Jersey Supreme Court denied Petitioner's Petition for Certification to the Court. This is reported at __ A.2d __ (1994).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction over this Petition.

STATUTES INVOLVED

Title 28 of the United States Code, § 1257, subsection (a) states that:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be received by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed the Constitution or the treaties or statutes of or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains several misleading statements which have a bearing upon whether or not this Court should grant this Petition.

First, Petitioner protests mightily that on several occasions it raised the "takings" issue in the state courts below but that those courts inexplicably ignored that argument (Pet. 9, 15). This is not quite correct as will be demonstrated *infra.* Petitioner never raised the "takings issue" as a federal constitutional issue until it sought review by the New Jersey Supreme Court. At that time, Respondents C-Town, a Division of Krasdale Foods, Inc. ("C-Town") and New Brunswick Housing Authority, a body corporate and politic ("the Housing Authority"), both noted the impropriety of raising this federal issue for the first time on a Petition requesting the New Jersey Supreme Court to exercise its discretionary appellate authority.

It should be noted that, despite filing an amended complaint, Petitioner never bothered to plead a violation of any provision of the United States Constitution by any of the Respondents. Even after the remark by the New Jersey Supreme Court in 1990, Petitioners chose not to assert any federal claim. Its pleadings continued to be framed in terms of the New Jersey Constitution and common law breach of contract.

Furthermore, as the trial judge noted in his bench opinion, at the commencement of the remand trial, "the parties" stipulated that the constitutionality issue as it pertains to the lease transaction between the Housing Authority and C-Town is no longer an issue in the case (Pet. App. 17a). Thus, the only constitutional issue of any kind raised by Petitioner was abandoned before the retrial only to have Petitioner attempt to inject an entirely different constitutional issue (*i.e.*, the "takings

issue") on its Petition for Certification to the New Jersey Supreme Court an application which that court denied in November, 1994.

While it is to be expected that Petitioner puts its own "spin" on the facts in its "Statement of the Case", the fact of the matter is that following the remand trial the trial judge made very specific findings of fact and conclusions of law based upon the guidance provided by the New Jersey Supreme Court when it first considered this case and reversed summary judgments in Respondents' favor and remanded this matter.

The trial judge's opinion (Pet. App. 15a-31a) speaks for itself. Contrary to Petitioner's assertion, the trial court *never* held, as Petitioner claims that the damage issue was moot because the restrictive covenant sought to be enforced adversely impacts upon the public interest and the public need (Pet. 15). Rather, after reviewing the right factors which the New Jersey Supreme Court ruled must be considered in resolving the issue of the reasonableness *rel non* of restrictive covenants concerning the use of real property. *Davidson Bros. v. D. Katz & Sons,* 579 A.2d 288 (1990) (Pet. App. 45a-46a). Thus, the trial judge did not focus solely upon the "public interest/public need" factor. Instead, the court applied the right "reasonableness factors" articulated by the New Jersey Supreme Court and found the equitable servitude, in this case, to be unreasonable, and hence void. The breach of this void restrictive covenant would not give rise to a damage remedy. In any event, the trial court found Petitioner had not proven its damage, if any (Pet. App. 31a).

Finally, petitioner again misstates the conclusion of the trial judge with respect to the issue of the consideration paid for the equitable servitude. His Honor did state that he was unable to determine whether any consideration had been paid because the evidence did not establish that a specific dollar value had been

assigned to the restrictive covenant. Rather, the trial court held that there simply was no evidence to establish whether consideration had been given, and for the court to reach a conclusion in this regard would be utter speculation (Pet. App. 18a).

Other misstatements abound but there are none which can be said to have any bearing on the relatively straightforward issues raised by this Petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE PETITIONER FAILED TO PROPERLY RAISE ITS FEDERAL CLAIMS IN THE NEW JERSEY COURTS.

"It is a long settled rule that the jurisdiction of this Court to reexamine the final judgment of a state court arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981), *citing New York, ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). This "properly raised federal question" doctrine is based upon "powerful policy consideration" which "strongly indicate that [this Court] should apply this general principle with sufficient rigor to make reasonably certain that [this Court] entertain cases from state courts only where its record clearly shows that the federal issue has been properly raised below." *Webb v. Webb*, 451 U.S. at 499.

In the matter *sub judice* Petitioner failed to properly present the issue of whether the alleged taking of its purported property interest violated the United States Constitution. Petitioner did not

make reference to the "Takings Clause" of the Fifth Amendment until its most recent Petition for Certification to the New Jersey Supreme Court. No federal cases concerning the United States Constitution were cited until this late date. The simple fact is that Petitioner pled and attempted to prove its case based upon New Jersey law only. Petitioner treats its state law claims like a pea at a carnival shell game. This case was commenced by Petitioner in 1986. For over eight years Petitioner has presented its case to the courts of New Jersey premised upon the laws or constitution of the state. Now, after almost nine years of litigation, Petitioner attempts legal slight of hand and finally reversal that the pea has been under the shell of federal law all along. Such gamesmanship will not do in invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1257. Simply, Petitioner set up no claim on the state courts in the Constitution of the United States.

> At the minimum, however there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. at 501 (emphasis in original). It should come as no surprise that New Jersey requires that a claim first be raised in the trial court before it can be properly raised on appeal. This general principle has been applied where, as here, a party attempts to raise a constitutional issue for the first time in a appellate court, *see Planned Parenthood of New York City, Inc. v. State*, __ A.2d __ (1977). Now here, in its Petition, does the Petitioner identify any federal constitutional claim which was "timely and properly raised so as to give this court jurisdiction to review the judgment on a writ of certiorari." Rule 14(h). Instead, Petitioner refers generally and ambiguously to its raiding of the

takings issue in the state trial and it deserved to be compensated for the value if any of its equitable servitude. Never until its latest petition to the New Jersey Supreme Court, did Petitioner attempt to ground this claim on the *United States Constitution.* For example Petitioner refers to its trial brief as one instance when it raised the takings issue in state court (Pet. 9). This is misleading. Petitioner's trial brief makes clear that its claim for "compensation" is simply one for compensatory damages for breach of a restrictive covenant — not compensation for a "taking" in violation of the United States Constitution.

Petitioner's Complaint and Amended Complaint clearly indicate that its claim was premised primarily upon the alleged breach of its restrictive covenant not any taking the appropriate remedy for party which contends its property has been taken by a public body without just compensation is an action for inverse condemnation. *Bloomfield Twp. v. Rosanana's,* 602 A.2d 751 (App. Div. 1992). Typically, takings cases under the New Jersey Constitution rely upon N.J. Const., Art. 1, ¶ 20, which provides that "private property shall not be taken for public use without just compensation," *Pappas v. Board of Adjustment,* 603 A.2d 65 (App. Div. 1992). New Jersey still maintains separate courts of law and courts of chancery jurisdiction of an inverse condemnation proceeding is in the Law Division of the Superior Court. *Orleans Builders and Developers v. Byrne,* 453 A.2d 200 (App. Div. 1982). Petitioner instituted this suit in the Chancery Division. Thus, these New Jersey authorities indicate that Petitioner itself did not really view its claim as one of an unjust taking inasmuch as it did not pursue its usual course for relief in such cases and did not bring suit in the appropriate court for such cases.

To the extent it raised any constitutional issues, state or federal, this case was pled and presented, at least originally, as an illegal "giving" case rather than a takings case. The only

Constitution claim raised at any time in these proceedings (except for Petitioner's latest effort to inject a federal element in its Petition for Certification to the New Jersey Supreme Court) was based upon the *New Jersey Constitution's* prohibition against public entities making gifts to persons and corporations. N.J. Const., Art. 8, § 3, ¶¶ 2-3. *See Davidson Bros. v. D. Katz & Sons, Inc.* (Pet. App. 50a). The genesis of this claim was a rent-free lease between the New Brunswick Housing Authority and C-Town. However, after the remand by the New Jersey Supreme Court, this state constitutional claim was abandoned by Petitioner (Pet. App. 17a).

On remand, therefore, *no* constitutional questions, state *or* federal were raised. Petitioner proceeded solely on the theory that it was entitled to compensatory damages for breach of contract. After Petitioner lost the remand trial, it appealed to the Appellate Division of the Superior Court — New Jersey's intermediate appellate court; *no* constitutional issues — state or federal — were raised on this appeal. At no time after remand did Petitioner seek to amend its pleadings to set forth a federal claim.

Petitioner disingenuously suggests that the Appellate Division ignored "the repeated efforts of Davidson Bros. to raise the takings issue" before that court (Pet. 15). The simple fact is that Davidson Bros. failed to argue on appeal that there were any federal, constitutional issues implicated in this case. Thus Petitioner cannot now be heard to complain that the Appellate Division failed to address this argument inasmuch as it was never properly presented to that court.

Another factor in Petitioner's presentation of this case indicates further that Petitioner, itself, did not view this as a Fourteenth/Fifth Amendment case until the very last stage of appeal in the state court system. In its pleadings, Petitioner lumped together all the defendants in the claims for relief. Two of

the Respondents herein (C-Town and D. Katz & Sons, Inc.) are indisputably private corporate entities. No separate claim was made against the two public entities (City of New Brunswick and the Housing Authority[1]). C-Town and D. Katz & Sons, Inc., would not be proper defendants on a "Takings Clause" claim arising under the Fifth and Fourteenth Amendments to the United States Constitution because they are not "state actors." The facts that the states of New York and New Jersey granted these entities corporate charters does not render them government agents. *See San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. 522, 543 (1986).

Certainly, C-Town's operation of a supermarket cannot be characterized as performing functions that have been "traditionally the *exclusive* prerogative" of the federal government. *San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. at 544 (emphasis in original). Indeed, in the first incarnation of this case, prior to the remand by the New Jersey Supreme Court in 1990, Petitioner had argued strenuously, in support of its State Constitution "givings" claim, that the existence of a supermarket was not even a *legitimate* "public purpose," much less an "exclusive" one. Because Petitioner did not raise its federal claim below, C-Town has no idea on what basis C-Town, a purely private concern, engaged in "state action" necessary to support the claims now asserted against it. Indeed, had these federal constitutional claims been asserted against C-Town, it would have moved to dismiss them, at the appropriate stage in the litigation, on the ground that C-Town is not a "state actor." But this is precisely the point. Petitioner's failure to frame its claims in terms of the Federal Constitution resulted in an inadequate record on this important issue of whether at least two of the

---

1. Assuming, *arguendo*, that the Housing Authority is a public entity. Whether it is or not was never explored below as Petitioner never properly raised a federal constitutional claim.

Respondents herein are "state actors" whose activities are subject to the Fifth and Fourteenth Amendments. The state courts below never had an opportunity to pass on this question. Thus, Petitioner has ignored the "very practical reasons for insisting that federal issues be presented first in the state court system." *Webb v. Webb,* 451 U.S. 493, 500 (1981) (need to develop full record, identification of independent and adequate state grounds for decision, etc.).

In sum the *only* constitutional claim ever properly asserted below was one based on the New Jersey Constitution's prohibition of gifts of public property to private corporations. This claim was abandoned at the commencement of the remand trial. Otherwise, Petitioner's claim for "compensation" was simply one for compensatory damages for the alleged breach of a restrictive covenant. In its trial brief submitted before the remand trial, Petitioner argued that "[T]he sole issue remaining for the Court is an award of money damages. Compensatory damages are designed to 'put the injured party in as good a position as he would have been if performance had been rendered as promised' (citation omitted). Compensatory damages *for breach of a restrictive covenant* are measured by the loss sustained by the Plaintiff by reason of the violation by the Defendant of the agreement (citation omitted)." Clearly, then, Petitioner's claim for relief was premised upon an alleged violation of an *agreement.* The claim was not based upon any allegation of a violation of the Federal (or New Jersey) Constitution. The claim actually litigated in the state courts was a straightforward state common law claim. Petitioner's entitlement to damages depend upon the legality (or under New Jersey law, the "reasonableness") of the restrictive covenant in question. Because Petitioner failed to raise its federal claim in the state proceeding, the state court below failed to rule on the "takings issue" which Petitioner now asserts. As a result, this Court is without jurisdiction in this case. *Webb v. Webb,* 451 U.S. at 501.

II.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Even assuming, *arguendo*, that Petitioner properly raised its federal claim in the state court system, a writ of certiorari, still, should *not* be granted.

Petitioner relies primarily upon this Court's decision in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994) in support of its argument that Respondents violated the United States Constitution. However, *Dolan* does not stand for the proposition that the government must pay compensation for "taking" a property interest which is illegal, such as Petitioner's equitable servitude. Nor do any of the other federal authorities cited in the Petition (none of which were cited in the state court) stand for such an outrageous proposition.

In 1990, the New Jersey Supreme Court, in this same litigation, announced a new standard for determining whether restriction on the use of real property is enforceable or not. *See Davidson Bros. v. D. Katz & Sons* (Pet. App. 32a-69a). The remand judge commented in his bench opinion, that the New Jersey Supreme Court's decision was "as clear a case as [he had] ever read . . . ," and that this opinion provided "a clear road map . . . on the issue of the reasonableness or unreasonableness of commercially imposed restrictive covenant." (Pet. App. 16a-17a). "Road map" in hand, the trial judge painstakingly set forth by the New Jersey Supreme Court to the facts of this case and found the covenant in question to be unenforceable.

Petitioner's covenant is a nullity. Nevertheless, Petitioner claims that it should be compensated for its "taking" stripped to its essentials. Petitioner's claim is that of a federal constitutional

right to get something for nothing. This is not a substantial federal question, to say the least.

In closing, it should be noted that the trial judge observed on remand that even if Petitioner's restrictive covenant was enforceable, Petitioner failed to shoulder its burden of proving any damages as a result of any breach of that covenant. We respectfully submit that it would be an inappropriate use of this Court's limited resources to grant certiorari where the Petitioner was unable to prove any damages flowing from what is now cast as the "taking" of a property interest.

CONCLUSION

For the reasons set forth, therefore, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 94-1381

In The

Supreme Court of the United States

OCTOBER TERM, 1994

DAVIDSON BROS, INC., a New Jersey Corporation,
Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation;
CITY OF NEW BRUNSWICK, a Municipal Corporation;
C-TOWN, a Division of Krasdale Foods, Inc., and
NEW BRUNSWICK HOUSING AUTHORITY,
a Body Corporate and Politic,
Respondents

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

It is not surprising that in light of the difficult and significant takings issue raised by the determinations of the New Jersey courts below, effectively declaring a recognized private property right null and void solely because that private property right interfered with some public purpose, Respondents' primary response to the present Petition is to raise purely procedural arguments in order to make it appear that the takings issue was not raised in the state courts, or, alternatively, that the determinations of the state courts rested upon adequate non-federal grounds concerning state property law. Neither assertion, however, can withstand scrutiny in light of what actually occurred in the New Jersey courts.

Initially, Respondents make much of the fact that the takings issue was not raised in the original Complaint and Amended Complaint filed in this action in June 1986 and February 1987 respectively. At the time the Complaint and Amended Complaint

were filed, however, and, indeed, at the time that the trial court rendered its first decision declaring the covenant at issue unenforceable, on the grounds that the covenant did not "touch and concern" the land as a matter of state property law, the C-Town had not opened for business at all, and there had, therefore, been no taking of Petitioner's covenant. The original determinations of the trial court and Appellate Division, moreover, were purportedly based solely upon peculiar issues of state law governing the enforceability of restrictive covenants as against subsequent purchasers, without any suggestion that such covenants, if otherwise enforceable as a matter of state property law, could nevertheless be disregarded by the state courts solely because they interfered with the supposed public interest in utilizing the restricted premises for the restricted purpose. Rather, as was demonstrated in the Petition, the law of the State of New Jersey was and (at least theoretically) still is directly to the contrary, and requires condemnation where governmental agencies seek to utilize restricted property in a manner that would otherwise be prohibited. See Petition, at pages 21-22.

Accordingly, until this case reached the New Jersey Supreme Court the first time, no takings issue existed. The lower courts had simply framed the issue of enforceability by reference to state property law concepts having nothing whatsoever to do with the particular benefit to the public of the use in question, and state law appeared clear that if the Supreme Court of New Jersey determined that the covenants did "touch and concern" the burdened property, and otherwise met the traditional state law tests of reasonableness in terms of duration and area, the covenant would be enforceable. State law also clearly provided that such an enforceable covenant could not be taken by the City, or Housing Authority, merely because a supermarket represented a benefit to the public, without compensation, any more than a covenant restricting the use of a parcel of land so as to preclude a public library could be taken without compensation. See Township of Millburn v. Pitt, 68 N.J. 424, 346 A. 2d 601 (1975).

Not until the New Jersey Supreme Court rendered its decision in this matter on July 26, 1990, did the possibility of an uncompensated taking, in violation of the state and federal constitutions, arise. In that decision, the Supreme Court flatly rejected the state property law theories relied upon by the lower courts, and squarely stated that

a covenant such as the present one did satisfy the "touch and concern" requirement. Pet. App. 47a to 49a. The New Jersey Supreme Court instead stated the test for enforceability of the covenant to be "reasonableness" and also set forth, as one of the factors to be considered, "whether the covenant interferes with the public interest." Pet. App. 45a. This is not a test which had previously been utilized by New Jersey courts, and, indeed, the New Jersey Supreme Court did not cite any New Jersey cases as authority, but rather, relied solely upon an Illinois case which dealt with the traditional issue of whether the covenant imposed an unreasonable restraint on trade, or secured a monopoly for the covenantor. Pet. App. 45a (citing Natural Prods. Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N.E. 840 (1923)). The Supreme Court then stated, vaguely, that defendants had claimed that "due to the circumstances of the neighborhood and more particularly the circumstances of the people of the neighborhood, plaintiff's covenant interferes with the public's interest," and that a remand was therefore necessary for further factual findings. Pet. App. 48a to 49a.

Justice Pollock's concurring opinion recognized the serious takings issue presented by the majority opinion. Thus, Justice Pollock stated that "[n]otions of `changed circumstances' and the `public interest' thinly veil the Authority's attempt to avoid compensating Davidson for the cost of the lost benefit of an otherwise-enforceable covenant," and wondered "whether the majority would so readily condone the Authority's taking of Davidson's property if the interest taken were one in fee simple and not a restrictive covenant," concluding that it "is wrong to take Davidson's covenant without compensation just as it would be wrong to take its fee interest without paying for it." Pet. App. 64a to 65a. Justice Pollock also discussed, with specificity, the appropriateness of condemnation and eminent domain as a remedy to be utilized by the Authority, and suggested that in order to avoid wasting judicial resources and the imposition of undue costs, Davidson Bros. should simply be awarded damages for breach of the covenant. Pet. App. 68a to 69a.

As the citations contained in the Petition made clear, Petitioner made repeated references to Justice Pollock's concurring opinion in its briefs to the trial court and Appellate Division, and consistently urged that it was improper for the covenant to be "taken" without compensation solely because of the asserted public benefit that a

supermarket at this location would represent. See references in Petition at pages 8-9, 15-16. In light of this record, as well as Justice Pollock's concurring opinion, the suggestion by Respondents that Petitioner presented this matter simply as a claim for money damages arising out of the breach of a contract, and ignored any takings issue, is, to say the least, disingenuous.[1]

It is also noteworthy that while the trial court opinion, following remand, at least purported to take into account certain factors traditionally relating to the enforceability of restrictive covenants as a matter of state property law, such as the finding that the restrictive covenant was unreasonable in its duration, or constituted a restraint on trade (Pet. App. 30a), the Appellate Division decision which is the subject of the present Petition makes no such pretense. Rather, the Appellate Division affirmed the trial court opinion solely "on the ground that the covenant was so contrary to public policy that it should not be recognized as a valid, enforceable obligation." Pet. App. 6a. Indeed, the Appellate Division decision abandoned virtually all established jurisprudence in the State of New Jersey, as well as the nation at large, and treated the restrictive covenant as if it were not an interest in property at all, but simply a "contract". Pet. App. 11a, 13a to 14a.

It is, then, the Appellate Division decision which squarely frames the issue of federal constitutional significance which should be resolved by this Court. Unlike all of the prior decisions in this case, the Appellate Division did not even purport to rest its decision on some factor or factors which, as a matter of state law, would have rendered the covenant unenforceable. Rather, the Appellate Division rested its entire determination on the theory that a restrictive covenant which the New Jersey Supreme Court had already found satisfied all of the traditional "touch and concern" tests, and which,

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[1]Certainly the takings issue was raised with far more clarity and precision here than in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), where this Court was able to find only one reference anywhere in the record below to the "Federal counterpart" of the pertinent provisions of the Florida Constitution, but nevertheless found a sufficient basis for consideration of the federal issue in light of general references to "due process," and to a "taking without due process of law." 449 U.S. at 159 n.5.

therefore, constituted a fully enforceable private property right, was nevertheless not a private property right at all because a public purpose would be served by the restricted use. Clearly, then, there is no escaping the fact that the Appellate Division decision amounts to express authorization for the naked taking of a private property interest for public use, without compensation, without any purported basis in state property law whatsoever other than existence of the public use itself.

It is respectfully submitted that this Court has not been so vigilant in precluding uncompensated takings in order to provide state courts with a means for allowing governmental agencies to avoid paying compensation when private property rights are taken by mere semantics. The issue here is not one of state property law at all, since, as Petitioner has previously demonstrated, and as Respondents have nowhere disputed, applicable state property law has always recognized that restrictive covenants which impeded some valid public purpose were not void for that reason, and that the public use could not proceed in the face of such a covenant without condemnation. If state courts are nevertheless given free rein to determine, in any case, that a private property right which has always been recognized as a matter of state law suddenly ceases to be a private property right at all because it "unreasonably" interferes with the very public purpose that would have justified condemnation, there will be nothing left to the takings clause at all.

An uncompensated taking is unconstitutional regardless of whatever tricks of labelling might be utilized by state courts. Where state courts have recognized private property interests specifically, and have held those interests subject to condemnation, the taking of those interests without compensation cannot be justified by the ruse of abruptly determining that those same interests no longer exist as a matter of "state law," and the refusal of state courts to enforce such covenants, on such a basis, in and of itself constitutes impermissible state action. Compare Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). Here, the only basis in "state law" which the Appellate Division asserted as a basis for declaring the covenant at issue not to constitute a private property interest was the very "public purpose" necessary to justify condemnation, rather

than to excuse it entirely. The issue is a significant one which should be addressed by this Court. Petitioner therefore respectfully requests that the present petition for certiorari be granted.

Respectfully submitted,

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